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NORTH CAROLINA'S RESOURCE FOR PUBLIC OFFICIALS

Would We Have Looked as Bad as Florida on Election Night 2000?

Also

National Origin Discrimination in Employment

A "Killer Application": Listservs for Local Governments

Wake County's Experiment in School Funding

Popular Government

James Madison and other leaders in the American Revolution employed the term "popular government" to signify the ideal of a democratic, or "popular," government—a government, as Abraham Lincoln later put it, of the people, by the people, and for the people. In that spirit *Popular Government* offers research and analysis on state and local government in North Carolina and other issues of public concern. For, as Madison said, "A people who mean to be their own governors must arm themselves with the power which knowledge gives."

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Established in 1931, the Institute of Government provides training, advisory, and research services to public officials and others interested in the operation of state and local government in North Carolina. The Institute and the university's Master of Public Administration Program are the core activities of the School of Government at The University of North Carolina at Chapel Hill.

Each year approximately 14,000 city, county, and state officials attend one or more of the 230 classes, seminars, and conferences offered by the Institute. Faculty members annually publish up to fifty books, bulletins, and other reference works related to state and local government. Each day that the General Assembly is in session, the Institute's *Daily Bulletin*, available in print and electronically, reports on the day's activities for members of the legislature and others who need to follow the course of legislation. An extensive Web site (www.iog.unc.edu) provides access to publications and faculty research, course listings, program and service information, and links to other useful sites related to government.

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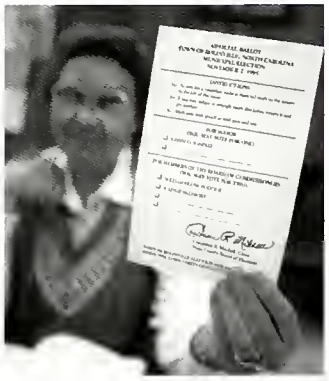

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Erin S. Norfleet

Wake County's Board of County Commissioners and Board of Education entered into a five-year agreement intended to resolve potentially contentious disputes over the level of county funding of schools. Was the agreement, which terminated in September 2002, effective? What can other systems learn from Wake's experience?

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New Guide Addresses Issues Related to Pregnant or Parenting Minors

The circumstances of youngsters under eighteen years of age who are about to be parents, or already are, raise interesting questions in several legal areas, including provision of social services. As a group, these young women (nearly all single, under-age, custodial parents are female) can benefit from considerable help from their local department of social services (DSS). Even a young woman who is mature, bright, and competent for her age usually lacks some of the resources she needs, now or for the future—sufficient income and education, housing, transportation, health care, employment, child care, and child support, among others. For these clients, their parents, their children, and possibly their partners, DSS is a crucial source of assistance.

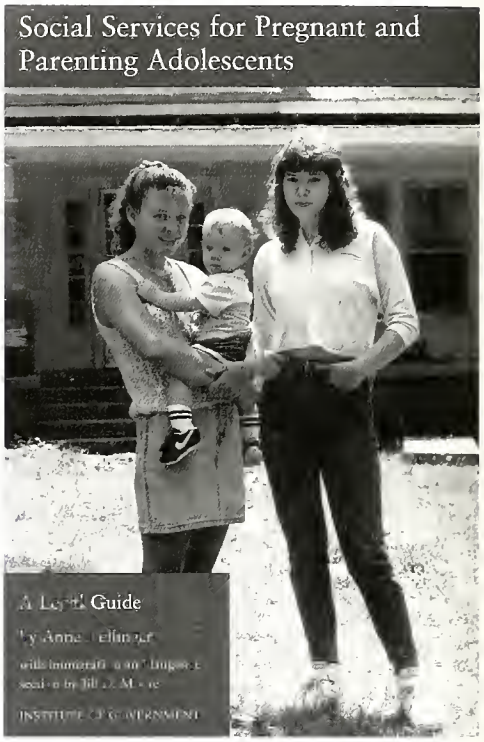
A recent Institute of Government (IOG) publication, *Social Services for Pregnant and Parenting Adolescents*, addresses some of the legal issues related to social services. For example:

- Can parents put a pregnant minor child out of their home?
- What are a pregnant or parenting adolescent's rights to attend school or community college, or to work?
- Are minors responsible for their child's support? If not, who is?
- Must minors live with their parents to be eligible for cash assistance?
- Does a young mother in foster care have a right to have her child with her? Must she surrender custody to do so?
- Who consents to adoption, health care, and other matters for a minor's child?
- If DSS staff learn that a minor has been subjected to statutory rape, must they report the crime to a law enforcement agency?

The last question illustrates well the complexity of the issues discussed in the IOG guide. Section 7B-307(a) of the North Carolina General Statutes requires a DSS director to contact a law enforcement agency within forty-eight hours if he or she learns of a possible crime that may have physically harmed a minor. Does that mean a DSS director must report intercourse involving a 13-, 14-, or 15-year-old who apparently consented? Such an act is a crime if the other partner is at least four years older than the minor. But can intercourse that is not known to have been physically coerced do *physical* harm? Yes. Pregnancy is a possible outcome, and it has more-than-minimal medical risks, particularly for very young women. Transmission of disease, including HIV infection, is another possible outcome.

In addition, DSS directors probably cannot know, especially within forty-eight hours, whether a minor's sexual activity constitutes statutory rape alone or results from greater coercion. Until a court rules on the matter, DSS directors might be prudent to share their information with a law enforcement agency.

With financial support from IOG and the Z. Smith Reynolds Foundation,



DSS staff, attorneys, and others have received the IOG guide without charge. It is the second in a series of five guides that are planned on the subject of pregnant and parenting minors. The text of the guide and that of an earlier book for health providers can be read and printed from www.adolescentpregnancy.unc.edu. For more information about the series, contact Anne Dellinger, telephone (919) 966-4168, e-mail dellinger@iogmail.iog.unc.edu.

Training on Relationships between Nonprofits and Governments

In March 2003 the Project to Strengthen Nonprofit-Government Relationships will again offer the training session Navigating Nonprofit-Government Relationships. For the first time, nonprofit staff are encouraged to attend. Only government staff participated in previous sessions.

It's "a wonderful idea to bring nonprofits and government together," one nonprofit liaison said. "This provides each entity with an opportunity to understand the dynamics of the other's work."

This will be the third offering of the training session, which focuses on interactions between city or county governments and community-based nonprofits. The decision to include nonprofit staff came at the encouragement of local government participants from previous sessions.

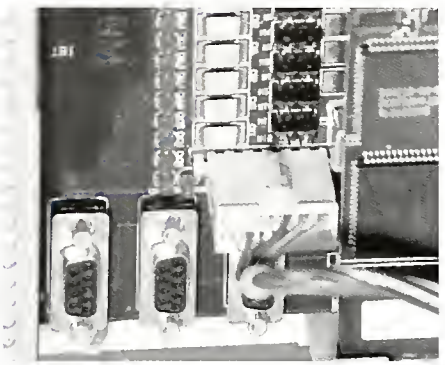
School of Government staff organizing the training include Gordon Whitaker, Margaret Henderson, and Lydian Altman-Sauer. Other trainers will be Gita Gulati-Partee from the NC Center *for* Nonprofits and Frayda Bluestein and Anita Brown-Graham from the School of Government.

The training will be held in Asheville on March 6–7, 2003. Participation will be limited to 40 people. For more information, contact Margaret Henderson, telephone (919) 966-3455, e-mail mhenderson@iogmail.iog.unc.edu.

Team Formed to Disseminate Best Practices in IT Security

In the last few years, many local governments have implemented information technology (IT) solutions to take advantage of the Internet—for example, systems for customers to pay utility bills or request services, or for employees at remote locations to communicate with city hall or the courthouse. Yet according to the Electronic Government 2002 survey of the International City/County Management Association, 55% of the local governments responding to the survey have no Web-site security policies or procedures in place, and 67% of the respondents say they have not changed their IT security practices since the terrorist attacks of September 11, 2001. In many cases the lack of security or the low level of awareness is due to limited training and resources in the local government.

To boost training and enhance resources, members of the North Carolina Local Government Information Systems Association, staff of the Institute of Government's Center for Public Technology, and faculty of the UNC–Charlotte College of Information Technology have created a Security Best Practices Team.



Over the next few months, the team will identify areas in which local governments' IT systems are vulnerable to intruders, develop instruments to assess the degree of vulnerability, and create tools for cities and counties to use in hardening their networks and servers against intruders. The team then will assist jurisdictions that need help making their systems more secure.

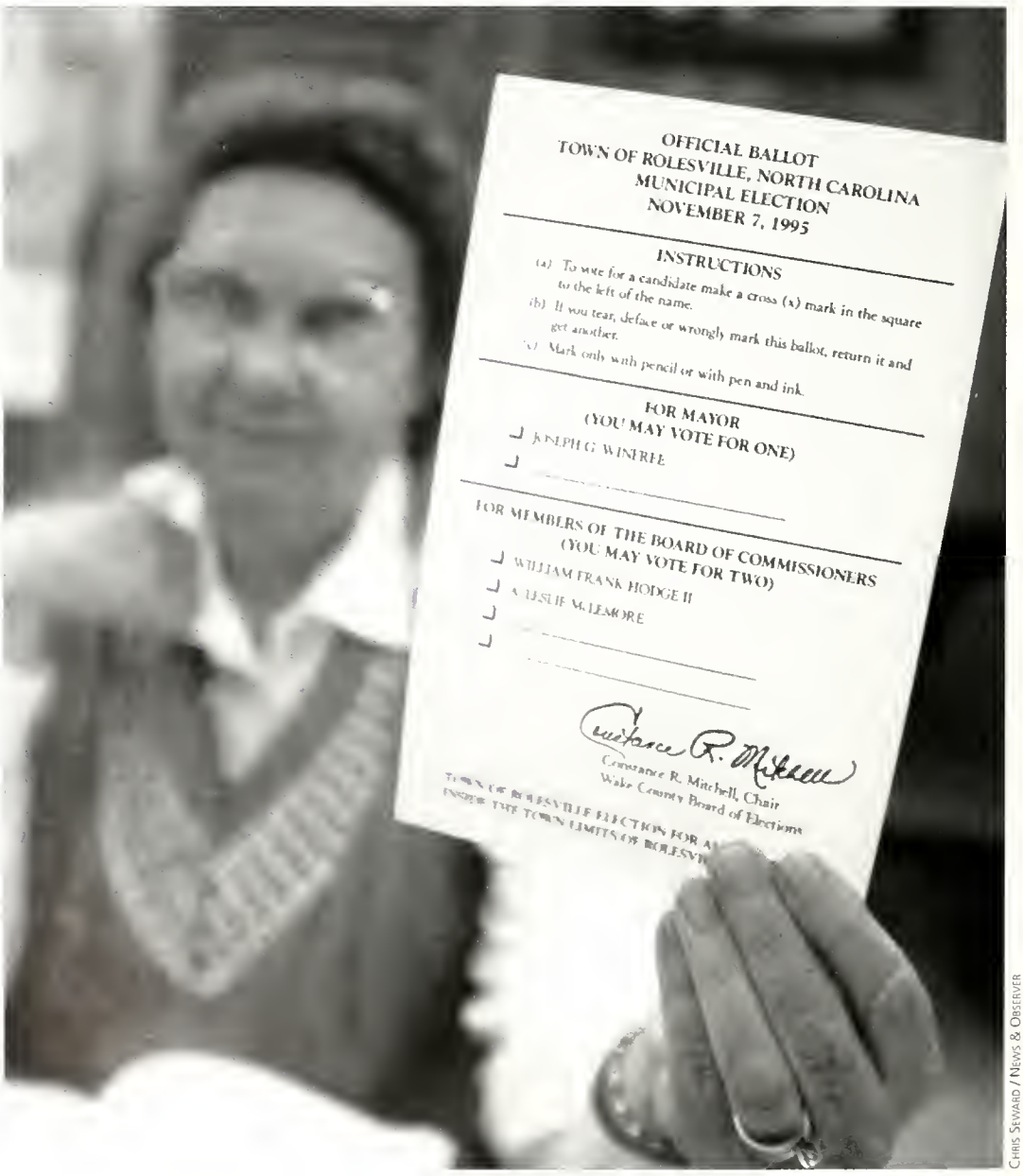
For more information, conract Tom Foss, technical assistance manager with the Center for Public Technology, telephone (828) 322-1331, e-mail foss@iogmail.iog.unc.edu.

Beginning with this issue of *Popular Government*, the Institute of Government will publish three issues per year instead of four. The seasons of publication will be fall, winter, and spring/summer. Unfortunately we will have to maintain this cutback as long as the state's budget problems persist. We hope that *PG* will continue to provide readers with timely and informative articles about matters of interest to them. —*Editor*

North Carolina in 2000 was way ahead of Florida in administrative structure of elections, in recount and protest practices, in procedures for ballot design and approval, in maintenance of voter lists and allowing of access to the polls, in handling of absentee ballots, and in the capacity to provide the immediate guidance that election officials needed.

News & Observer

Above right: The validity of absentee ballots became an issue in the 2000 election in Florida. Right: To cut costs in the primary election, a North Carolina polling place used old-fashioned paper ballots.


OFFICIAL BALLOT
TOWN OF ROLESVILLE, NORTH CAROLINA
MUNICIPAL ELECTION
NOVEMBER 7, 1995
INSTRUCTIONS
(a) To vote for a candidate make a cross (x) mark in the square to the left of the name.
(b) If you tear, deface or wrongly mark this ballot, return it and get another.
(c) Mark only with pencil or with pen and ink.
FOR MAYOR
(YOU MAY VOTE FOR ONE)
JOSEPH G. WINERE
FOR MEMBERS OF THE BOARD OF COMMISSIONERS
(YOU MAY VOTE FOR TWO)
WILLIAM FRANK HODGE II
Constance R. Mitchell, Chair
Wake County Board of Elections

Chris Seward / News & Observer

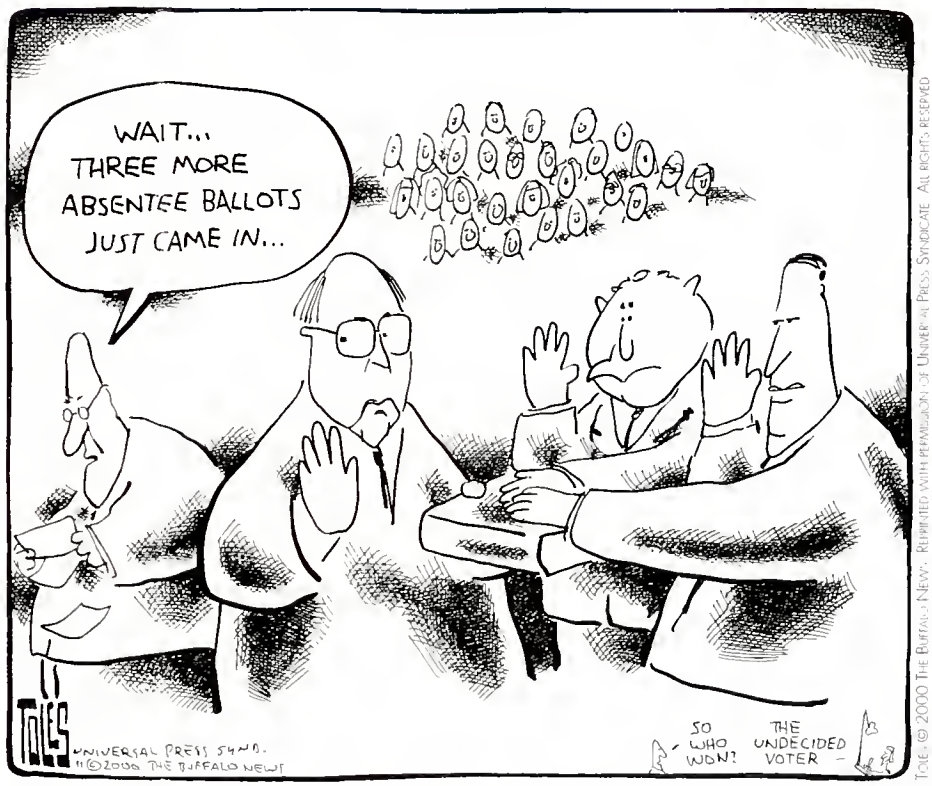
Would North Carolina Have Looked as Bad as Florida on Election Night 2000?

Gary O. Bartlett and Robert P. Joyce

Florida looked bad on presidential election nighr 2000 and in the weeks that followed. Voter after voter told of finding the ballots inscrutable or of being turned away from the polls altogether. Elections officials held punch-card ballots up to the light, counting them one way in this county, another way in that county. Lawyers argued in the state trial courts, in the state appellate courts, in the federal trial courts, in the federal appellate courts—indeed, all the way to the U.S. Supreme Court. Overseas absentee ballots poured in for days after the election, counted by one standard here and another standard there. Through it all, the minuscule gap between George W. Bush and Albert Gore survived.

The whole world watched. Elections officials in every jurisdiction outside Florida counted their lucky stars. They recalled their bedtime prayer on the night before each election: "Whoever wins, let it not be close." If the election had been as close in North Carolina as it was in Florida, would we have looked as bad? We have many of the same practices and problems, and we would have faced enormous challenges. We would have made mistakes. Our hodgepodge of voting equipment of varying ages and states of maintenance was much like Florida's. Our difficulties in determining voter intent would have rivaled theirs.

But no, we would not have looked as bad. North Carolina in 2000 was way ahead of Florida in administrative structure of elections, in recount and protest practices, in procedures for ballot design and approval, in maintenance of voter lists and allowing of access to the polls, in handling of absentee ballots, and in the capacity to provide the immediate guidance that election officials needed. This article summarizes what happened in Florida and why it could not have happened in North Carolina.



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What Happened in Florida

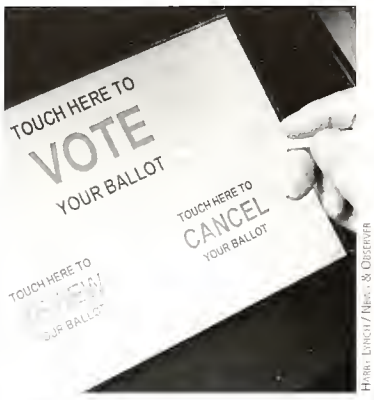
The election of the president is not a national election. Because of the Electoral College, there are actually fifty-one separate elections, one in each state and the District of Columbia. As the world watched on election night 2000, it slowly became clear that whoever won the Florida electoral vote—Bush or Gore—would become president.

Bartlett is executive director of the North Carolina State Board of Elections. Joyce is a School of Government faculty member specializing in elections law. Contract them at gary.bartlett@ncmail.net and joyce@iogmail.iog.unc.edu.

As the night grew late, the television networks called the election for Bush, then withdrew the call. Gore telephoned Bush to concede, then telephoned back to withdraw the concession.

Protests and Lawsuits under the Florida System

The first official tally showed that Bush led by 1,784 votes out of 6,000,000 cast. That is a margin of three-hundredths of one percent—far, far closer than the one-half of one percent margin that, under Florida law, triggers an automatic machine recount. On November 8, a machine recount was carried out, with each county using its own techniques; there was no uniform guidance from the Elections Division of the Florida Secretary of State's Office. As the counties reported the figures, the margin between Bush and Gore, already unimaginably small, shrank, reaching a mere 375 votes.[1]



HANK LYNCH / NEWS & OBSERVER

With the latest innovation, direct-record electronic machines, voters must touch the proper places on the screen (as they do on a bank's automatic teller machine) and then touch the closeout indicator.

Then the legal proceedings began. The sight was not pretty. Florida law set up a bifurcated scheme for challenging election results. *Before certification* of the statewide count, a candidate or a voter could file a "protest" with the county canvassing board. The county canvassing board (composed of the supervisor of elections—an elected official—a county court judge, and the chair of the county commissioners) then could conduct a sample manual recount of one percent of the ballots (from at least three precincts) and determine whether a manual recount of the entire county was called for. *After certification* of the statewide count, a candidate or a voter could file a "contest," which was not an administrative proceeding in the county but a lawsuit in the courts.

On November 9, acting under the *protest* provisions, the state Democratic party requested a manual recount of the votes in four counties. The canvassing boards in those counties conducted the sample manual recounts. In Broward County the count showed a net increase of 4 votes for Gore; in Palm Beach County, it showed a net increase of 19 for Bush. With results like these, all four county canvassing boards, acting individually, voted to conduct countywide manual recounts.

Soon the Palm Beach County Canvassing Board became concerned that it could not complete its full manual recount and report the results by the one-week vote-reporting deadline set in Florida law, so it asked the secretary of state for guidance. Acting on a legal opinion from her Elections Division, the secretary of state announced that the one-week deadline was firm and that she would not accept any returns of the manual recounts received after 5:00 P.M. on November 14.

The Volusia County Canvassing Board then brought a lawsuit (in which other county canvassing boards joined) in Florida state court seeking a judgment declaring that it was not bound by the November 14 deadline and directing the secretary of state to accept late returns. On the day of the deadline, the judge in this case ruled that the canvassing boards of the state could submit their manual returns after the deadline and that the secretary of state should exercise her judgment in whether to accept them. "Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done," the judge said, "the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner."[2]

On receiving this opinion, the secretary of state instructed the Florida supervisors of elections to submit to her by 2:00 P.M. the next day, November 15, a written statement justifying any belief on their part that they should be allowed to submit returns after the November 14 deadline. Four counties submitted such statements; the secretary of state rejected all four. She then said that she would rely on the totals submitted by the November 14 deadline (that is, the totals that did not include the manual recounts) and would certify the election results as soon as she had received the certified returns of the overseas absentee ballots from each county (an issue also about to explode into a legal battle—discussed later).

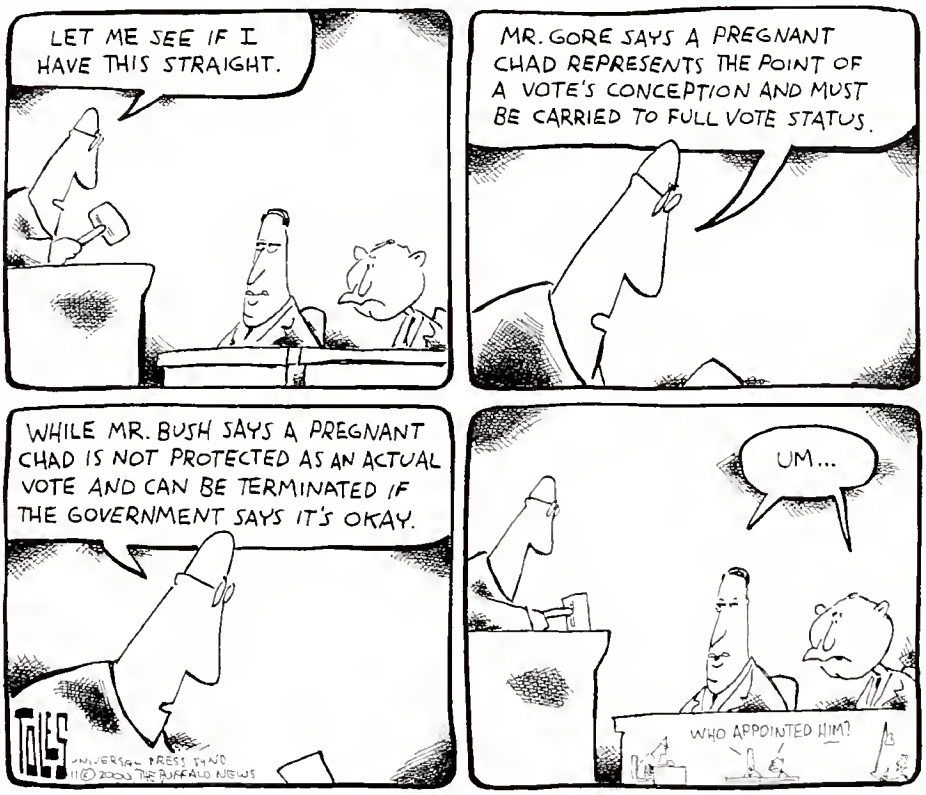
Gore and the Florida Democratic Party then went back to Florida state court asking for an order compelling the secretary of state to accept the returns reflecting the manual recount. The judge refused, and the Democratic forces appealed. The appeal was passed directly to the Florida Supreme Court, where it was combined with an appeal that the Volusia County Canvassing Board had made from its lawsuit. The Florida Supreme Court directed the secretary of state not to certify the election results until it had heard the appeal.

That is where matters stood one week after the election. The legal wrangling had just begun. This was only the election protest. There remained an election contest.

Voters Turned Away at the Polls

Meanwhile, a separate problem was brewing, also not pretty. All across Florida, but especially in counties with large African-American populations, large numbers of potential voters were saying that they had shown up at the polls to vote but been unlawfully turned away.

In 1997 the Florida state courts overturned the victory of a candidate for mayor in Miami, finding that voter fraud—in the form of ballots cast in the name of dead people—contributed significantly to his election. The Florida legislature responded by directing the


LET ME SEE IF I HAVE THIS STRAIGHT.
MR. GORE SAYS A PREGNANT CHAD REPRESENTS THE POINT OF A VOTE'S CONCEPTION AND MUST BE CARRIED TO FULL VOTE STATUS.
WHILE MR. BUSH SAYS A PREGNANT CHAD IS NOT PROTECTED AS AN ACTUAL VOTE AND CAN BE TERMINATED IF THE GOVERNMENT SAYS IT'S OKAY.
UM...
WHO APPOINTED HIM?
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Elections Division of the Secretary of State's Office to contract with a private company to purge the voting rolls of ineligible voters, including deceased people, people adjudged mentally incompetent, and convicted felons, who, under Florida law, permanently lose their right to vote. The company that was awarded the contract combined information from several state databases—including those from law enforcement, the Bureau of Vital Statistics, and the Executive Board of Clemency—to create a list of ineligible people. The resulting list included more than 40,000 possible felons.[3] After discussions of how to trim that number, the decision was made to go with a list that included too many names rather than too few.[4]

Two versions of this overinclusive list were then sent to the county elections supervisors, one in 1999, and one in summer 2000. Under Florida law, supervisors were to attempt to verify the accuracy of the lists. The statute provided that "[if] the supervisor does not determine that the information provided by the division is incorrect, the supervisor must remove [the voter's name] from the registration books by the next subsequent election."[5] State officials issued no guidelines to supervisors on how to go about this statutory duty. As a result, each supervisor established his or her own policy.[6] Most supervisors sent letters to possible felons on the list. Some checked with clerks of court. In at least two populous counties (Broward and Palm Beach), the supervisors ignored the list altogether.

In the months before the 2000 election, thousands of people who were not dead or mentally incompetent or not convicted felons were removed from voter rolls.[7] Many of them first learned of their exclusion when they went to the polls on election day. The burden fell disproportionately on African-Americans, who represented more than 65 percent of the names on the 1999 and 2000 lists. In Miami-Dade County, for example, white people account for 77.6 percent of the population but made up only 17.6 percent of the 1999 felons list.[8]

Given the traditional tendency of African-American voters to cast votes for Democratic candidates in higher proportions than voters generally do, Democratic forces saw the adverse impact on African-American voters from this purge as a direct threat to Gore's chance to prevail in the extremely close election.

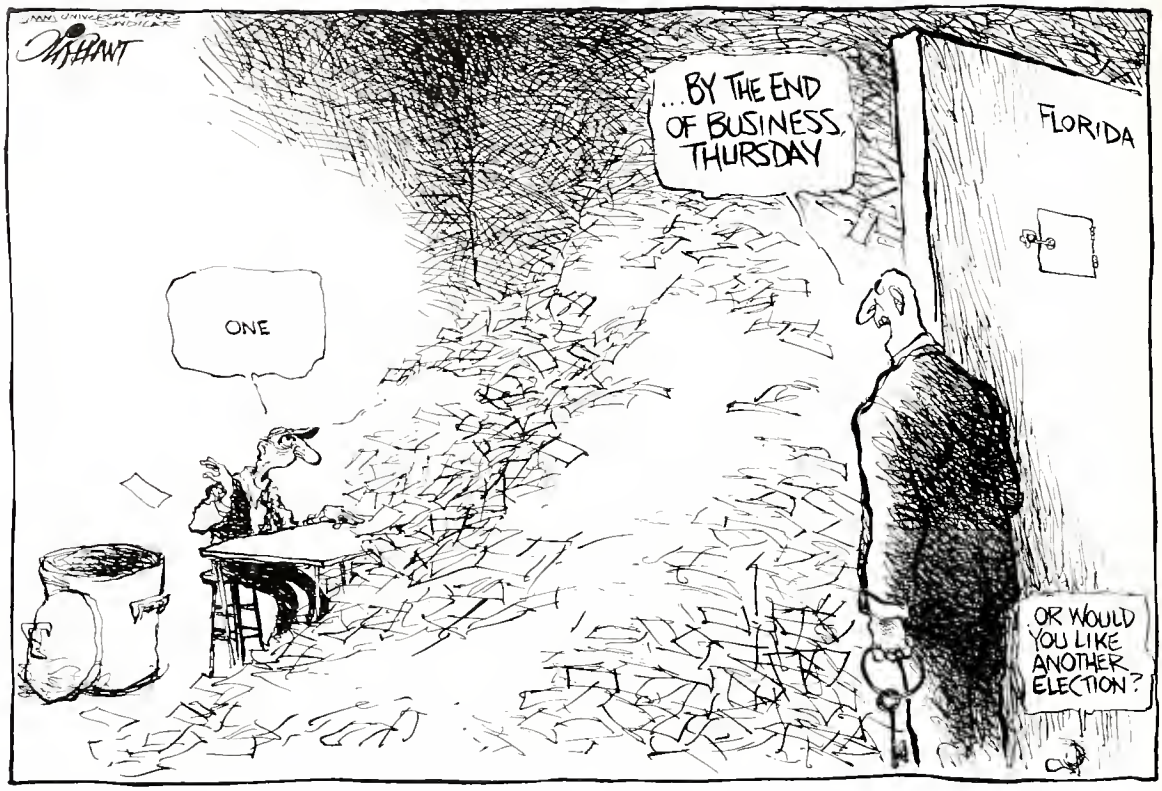
Voters Confused by Ballot Layouts

The rules that govern the ability of a candidate to get on the ballot vary from state to state. For the 2000 election, twelve candidates were on the presidential ballot in Florida. Each supervisor of elections was responsible for designing a ballot that would work on the kind of voting equipment used in his or her county and fit all the candidates' names in limited space. There was no review by anyone at the state level; each supervisor worked alone.[9]

In Palm Beach County, where punch-card voting machines were used, the supervisor of elections decided against using a small typeface to solve the space problem; too many of the voters in her county were elderly. Instead, she designed what came to be known notoriously as the "butterfly ballot." The names of some of the candidates for president were printed down the left side of the ballot, the names of others down the right side. The punch holes where voters were to mark their choice ran in a single row down the center. The first name on the left side was Bush. The first punch hole in the middle row was for Bush. The second name on the left side was Gore. But the second punch hole in the middle row was not for Gore; it was for the Reform Party candidate Pat Buchanan, whose name was listed first on the right side. The punch hole for Gore was the third one in the middle row.

In the days after the election, many voters said that they had punched the second hole, meaning to vote for Gore but instead voting for Buchanan. With only 337 registered Reform Party members in the county, Buchanan received 3,407 votes, four times higher than his total in his next-best county in Florida. An additional 5,310 people punched the holes for both Gore and Buchanan, invalidating their ballots as "overvotes."[10] Further, more than 19,000 ballots in Palm Beach County contained two punched holes for president. All 19,000 were disallowed.[11]

In Duval County the supervisor designed a multipage ballot in which presidential candidates' names appeared on both the first and the second page, with an instruction to "vote all pages." More than 21,000 voters apparently


...BY THE END OF BUSINESS, THURSDAY
FLORIDA
ONE
OR WOULD YOU LIKE ANOTHER ELECTION?
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took that instruction literally and voted for presidential candidates on both the first and the second page, invalidating their ballots as overvotes.[12] In sixty-two Duval County precincts with African-American majorities, nearly 3,000 people voted for Gore *and* a candidate whose name appeared on the second page of the ballot.[13]

In those two counties alone, 40,000 potential votes for president were not counted. It seems certain that at least some of those overvotes were caused by voter confusion based on ballot design.

The Torturous Arrival of Absentee Votes after Election Day

The main legal wrangling began on November 8, when the Gore forces began protests in four counties, seeking manual recounts of ballots cast at the polls on election day. That battle eventually went to the U.S. Supreme Court.

At the same time, a separate legal battle was swirling. This one involved absentee ballots cast by civilians and military personnel overseas. It was to constitute another example of county canvassing boards setting their own standards with no guidance from the state, unequal application of the rules, and nearly endless confusion.

Florida conducts its primary elections in September (followed by a runoff primary, when necessary) and its general elections in November. That schedule provides a very short turnaround time for elections officials to tally the votes and certify the results of the primary and then start the procedures for the general election. Especially tight is the time for mailing absentee ballots and receiving them back. Florida law used to require that, to be counted, absentee ballots be received by the supervisor by 7:00 P.M. on election day. In the early 1980s, the federal government sued the state, saying that the short time between the primary and the general election did not allow enough time for overseas civilian and military voters to receive, mark, and return their absentee ballots.[14] To settle the suit, the state agreed to accept and count an absentee ballot cast for a federal office by an overseas voter if it was postmarked, *or* signed and dated, no later than election day and received no later than ten days after the election. That is, valid ballots could continue to come in for ten days after the election. Those rules were incorporated into regulations in the Florida Administrative Code.[15] Absentee ballots from Floridians in the state or elsewhere in the United States were not affected; they still had to be received by election day.

On their face the requirements were straightforward: (1) the voter had to be overseas, (2) the ballot had to carry a postmark or a dated signature no later than election day, and (3) the ballot had to be received by the tenth day after the elections.

In practice, though, the counting was anything but straightforward. Immediately after the election, as explained earlier, the Bush and Gore camps focused their efforts on the legal battles over manual recounts of ballots in the four counties where Gore had initiated his protest. Recognizing the incredible closeness of the vote totals, however, both camps also turned attention to the incoming and not-yet-counted overseas absentee ballots.

In general, both candidates figured that Gore would get a higher percentage of overseas civilian absentee votes, Bush a higher percentage of the much more numerous military ones.[16] As ballots began arriving, it became clear that many did not bear postmarks, so it was not possible to determine whether they were mailed before or after election day. Further, even though the administrative

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During recounts, witnesses for the involved candidates often are present to ensure that officials follow appropriate procedures.

code provision said to count ballots that were postmarked or signed and dated before election day, only one of Florida's sixty-seven county election supervisors had provided a date line on the ballots, so that provision was useless. Many ballots were even found to be unsigned. Gore developed the strategy of challenging absentee votes, recognizing that Bush would probably get a higher percentage of those that were counted. By contrast, Bush pushed for a looser interpretation of the absentee rules, arguing that supervisors should not insist on technical compliance in ways that would disenfranchise voters. To some extent in these arguments, both candidates were taking positions inconsistent with their positions in the main argument regarding manual recounts—in which Gore was arguing for a more inclusive count, and Bush was arguing, in effect, to cut off the recount process.

The Bush and the Gore campaigns dispatched representatives to the county elections offices on November 17 (the tenth day after the election), when the canvassing boards began counting the absentee votes. In many cases there were ballot-by-ballot arguments over legitimacy. In some counties the canvassing boards stuck to the literal wording of the regulation (and to past practice) and counted no ballots that lacked postmarks or were postmarked late. In other counties the boards counted some or all of such ballots. In some counties the boards counted ballots that had domestic postmarks, on the (erroneous) belief that some mail from overseas military people ended up with domestic postmarks. In other counties those ballots were not counted. Fourteen counties reopened their counts after lawsuits were filed; the others did not.[17]

Through it all, there was no guidance from the state.

A Democratic lawsuit challenging the acceptance of any absentee ballots after election day was decided December 9 in federal district court,[18] December 11 in the federal court of appeals.[19] The court of appeals upheld the ten-day practice.

The next day, the U.S. Supreme Court, ruling in the main, manual-recount lawsuit, issued the final ruling that brought all the matters to a close.

The Trouble with Voter Intent

"Pregnant chad," "hanging chad," and "dimpled chad": those terms entered the American consciousness in the days following the 2000 election. They relate specifically to the use of punch-card voting machines and generally to the concept of "voter intent."

With any kind of voting system, voters must follow instructions in order to have their votes properly counted. On old-fashioned paper ballots counted by hand, voters must make marks with a pen or a pencil in the right places beside candidates' names and then place the ballots in the ballot box. With mechanical-lever machines (antiquated devices not even manufactured anymore), voters must pull the levers beside the desired candidates' names in all the different races and then pull the final locking lever to record the votes. With punch-card machines, voters must use a special implement to punch small holes in the ballots along perforated lines to indicate their choices (creating small chads), and then feed the ballots into the tabulator. With modern optical-scan machines, voters must fill in the proper spaces on the ballots beside candidates' names, using a marker supplied by precinct officials, and then feed the ballots into the tabulator. With the latest innovation, direct-record electronic machines, voters must touch the proper places on the screen (as they do on a bank's automatic teller machine) and then touch the closeout indicator.

Election Safeguards and Voter Confidence

No election is perfect. Mistakes always haunt the process, and on rare occasions, fraud taints it. But North Carolina has built-in safeguards that should give voters confidence.

The news media try to report the names of winning candidates on the night of the election, but elections workers know that the election isn't over till it's over—when the results are "canvassed" (closely examined) on the Friday after the election and the winners are certified. Holding the canvass three days after the election provides time to count provisional ballots and to audit all ballots. It also allows time for anyone concerned about possible errors to protest the election or request a recount.

Protests, Hand-to-Eye Counts, and the Power to Order New Elections: *Lee County*

Take the case of the 1994 election for District 15 in the North Carolina Senate. The election night total showed that one candidate had won by only eight votes. A mandatory machine recount added 200 votes to the total count in one county in District 15—Lee County. How could that be?

At this point the trailing candidate took advantage of North Carolina's election protest procedures, initiating a protest. The county board of elections heard the matter and voted to conduct a "hand-to-eye" (manual) count, in which humans recount all ballots, even those the machines initially read. The candidate who had been leading after the initial count appealed that decision to the State Board of Elections. The state board ordered that the hand-to-eye count go forward in Lee County.

The hand-to-eye count is available as a safeguard because voting machines can, under certain circumstances, count incorrectly. When optical-scan voting machines run across a ballot that they cannot read, they reject it, kicking it into a special repository—called the "outstack" or the "center bin"—to be hand-counted later. This safeguard is intended to ensure that voters who mark the ballot wrong still can have their votes counted. (Other types of voting equipment have similar built-in safeguards.)

The outstack safeguard does not always work. Sometimes an irregular marking by a voter will not cause the machine to kick the ballot to the outstack but will "fool" the machine into counting or not counting the ballot in a particular way—perhaps not the way the voter intended. Maybe the voter did not use the marker that the precinct official provided. Maybe the voter properly marked the ballot in some of the races and improperly marked it in other races. Maybe the voter used some kind of indicator other than filling in the proper place on the ballot. In addition, many voting machines are suspect because of age or poor maintenance.

In Lee County it turned out that the problem with the 200 extra votes was not a problem of improper marking of ballots or malfunctioning machines. In the initial machine recount, officials had accidentally counted one outstack *twice*—even in a machine recount, the outstack must be counted by hand—and that explained the extra 200 votes. The error was immediately corrected.

With the 200-vote discrepancy cleared up, a surprising new problem emerged. The Lee County hand-to-eye recount of all the machine-counted ballots and all the outstack ballots yielded this result: across District 15 as a whole, the candidates were tied, and there were two ballots on which the voter's intent could not be clearly determined. The county board reported these results back to the state board.

The state board has the authority to determine the outcome of elections. It also has an authority unique in the United States: if justice demands, it can call for the people to settle the matter in a new election. That is what the state board did in the District 15 situation. In other states the final appeal is to a court, which can determine the proper outcome. A decision rendered by the people brings finality to the outcome, whereas a judge's decision can leave doubt.

Self-Policing: *Gaston County*

Inherent in election laws is the assumption that all facets of the process will be conducted honestly. To preserve the integrity of elections, there are processes and procedures to remedy potential problems. Voters can be challenged on their qualifications any

In Florida's sixty-seven counties, all five kinds of systems were represented. (Only one county used the old-fashioned paper ballots, however.)

Every state has a choice in how to count ballots: to insist that voters mark the ballots correctly, or not to require strict technical compliance with instructions. States that make the latter choice are said to be governed by a desire to honor a voter's intent. Florida was a "voter intent" state. The relevant statute provided that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."[2] As the state supreme court expressed it, "[S]o long as the voter's intent may be discerned from the ballot, the vote constitutes a 'legal vote' that should be counted."[21]

As described earlier, on the first day after the election, Gore forces started an election protest in four counties, seeking a manual recount of the ballots. In effect, they asserted that the machines in those counties had failed to count votes that voters had intended to cast.

At the end of the first week after the election—that is, by November 14—the protests begun by the Gore campaign had succeeded in getting several counties to begin manual recounts, but the secretary of state had said that she would not accept any returns after the statutory seven-day deadline, November 14. The matter quickly made its way to the Florida Supreme Court, which on November 17 directed the state Elections Canvassing Commission not to certify the final results of the election until further order of the court.

On November 21, two weeks after election day, the Florida Supreme Court ruled that the secretary of state had abused her discretion in refusing to accept returns from counties conducting manual recounts, and ordered her to accept any such returns that came to her by 5:00 P.M. on Sunday, November 26. Manual recounts then continued in Broward,

time the registration books are open and even on election day. Precinct judges hear challenges on voters and can summon local law enforcement officers if problems arise. Laws on campaign finance disclosure ensure that the public has access to information regarding money received and money spent. Most information in election offices is subject to public records laws and available for public inspection. Additionally, the intense interest with which the candidates, the political parties, and the electorate watch the electoral process amounts to a safeguard.

In 1998, Gaston County was using direct-record electronic voting machines for the first time. Before the election, officials discovered some problems with the machines, and an upgrade was necessary. The machines were run through basic testing, but the upgrades cut into time for additional testing for known "bugs."

Suddenly it was election night. The first sign of a bug appeared when the time came to report the totals. Nearly one-third of Gaston County's precincts reported no votes because the cartridges that read the totals from the machines were not functioning. Another facet of this bug was evident for the county at large: when the vote totals reached 32,000, the tabulators would not tally any higher.

The chair of the county board of elections opened the process up to all who wished to observe, as the computer experts opened the machines and retrieved the source code that showed the proper vote totals. The internal drives that showed how each voter had voted were intact and retrievable. Two statewide court of appeals races, one state House of Representatives race, and one local race were close enough that they were determined by the data retrieved from the machines. Because of the safeguard of public scrutiny, confidence in the way the matter was handled was high, and there were no election protests.

The Provisional Ballot: *Rowan County*

A long-time practice of county boards was to purge voter rolls to clean out deadwood. In Rowan County a voter was removed from the roll for not voting in any elections over a cycle that included two presidential elections. This practice was later made unlawful under the National Voter Registration Act of 1993. When the voter arrived at the polls in a 1995 election in the town of China Grove, she was told that she was not on the roll. In other states she might have been turned away. In North Carolina, however, she was allowed to vote a "provisional ballot"—a ballot that is put aside on election day and not counted unless it can be determined that the voter should have been on the roll. In this voter's case, the board of elections had access to records that showed she had been registered to vote in the county, had been removed under the old purge law, but had maintained continuous residence in the county. The board determined that her provisional ballot should be counted. Without her vote the election would have ended in a tie; with her vote, the winner's margin was one.

Conclusion

These safeguards and others are part of an electoral process in which all elements must work together. When one of the safeguards is overlooked, ignored, or circumvented, problems may follow. The weakest links can be threatened by stresses on the system:

- Funding cuts that overburden county election staffs
- Shortened cycles for absentee ballots
- Shortened cycles for ballot preparation and equipment testing
- Shortened cycles for recounts and for administrative hearings of election protests
- The challenge of finding experienced and skilled precinct workers

North Carolina's election process is strong. With these safeguards and the participation of the citizenry, it should withstand the challenges.

Miami-Dade, and Palm Beach counties (Volusia having finished), all counties using punch-card voting machines.

No state guidelines existed on how to conduct the manual recounts or how to determine voter intent. If a voter punched a clean hole in the proper place in the ballot beside a candidate's name (knocking the chad completely out), the machine counted that vote. But what if the voter pushed the chad so that it hung by one or more corners (a hanging chad), or pushed the chad out to a certain extent but did not push it loose (a pregnant or dimpled chad, depending on how far out it stuck)? Which of those, if any, counted as a vote?

Broward County got its returns to the secretary of state by the November 26 deadline. Palm Beach County missed by a few hours. In Miami-Dade the canvassing board concluded that meeting the deadline was impossible and stopped counting altogether. All other counties with outstanding returns reported them to the secretary of state, and on the evening of November 26, the Elections Canvassing Commission certified the results and declared Bush the winner by a margin of 537 votes.[22]

The next day, Gore moved from protest to *contest*, filing a new lawsuit in Florida state court challenging how the votes had been counted and seeking a new round of recounting, this time by state court judges. On December 4, the trial judge ruled that Gore had failed to make the showing necessary to sustain a contest. Gore appealed to the Florida Supreme Court.

That same day, in the *protest* case, the U.S. Supreme Court overturned the November 21 decision of the Florida Supreme Court and sent the case back, saying that the court had not dealt sufficiently with issues of federal law. So now both the protest and the contest were in the hands of the Florida high court.

On December 8, the Florida Supreme Court ruled on Gore's *contest*. It held

that the Elections Canvassing Commission should have counted 215 net votes for Gore identified by the Palm Beach County Canvassing Board and 168 net votes for Gore identified in the partial recount by the Miami-Dade County Canvassing Board. Those two together reduced the 537-vote Bush lead to 154 votes. Further, the Florida court ruled, there were 9,000 ballots in Miami-Dade County that had never been reviewed manually because that county's canvassing board had stopped counting when it realized it could not finish by the November 26 deadline. Those ballots should be manually recounted immediately, the state supreme court said (along with a statewide manual recount, if the trial court so decided). It ordered the trial court to make that happen.

The world once again held its breath. Were there 154 net Gore votes in those 9,000 ballots? If so, the entire election would change.

The trial court judge immediately got the recounts going. To avoid some of the confusion and the chaos of the earlier rounds of manual recounting, he ruled that no one could object to how particular ballots were counted. He directed county canvassing boards across the state to develop their own protocols for going about the recounts. He explicitly acknowledged that there would be no specific, uniform standards to guide the recounts.

On December 9, the U.S. Supreme Court brought the whole process to a stop. It stayed the December 8 decision of the Florida Supreme Court. Explaining the stay, Justice Antonin Scalia said, "Count first, and rule upon legality [of votes] afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires."[23]

Three days later, on December 12, the U.S. Supreme Court closed this chapter in American election history when it ruled that the manual recounts must not go forward because they were being conducted under such uneven conditions as to violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution: "[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[24] The Court also objected to the Florida Supreme Court's ordering a recount of "undervotes" (ballots on which the voter's intent may not be clear) but not overvotes.

That very day was the federal statutory deadline (the importance and the impact of which was under debate) for the states to report their selection of electors to the Electoral College. That deadline having arrived, the U.S. Supreme Court said, there was no time to develop uniform guidelines for conducting the manual recounts. Therefore they must be stopped.

The recounts were over. Bush was the winner.

Why North Carolina Would Not Have Looked as Bad

Florida looked bad for many reasons:

- It lacked a state elections structure that could quickly give accurate, controlling guidance to the counties on such matters as manual recounts, and could effectively and efficiently handle election challenges.
- When Gore started election protests in four counties, elections officials were unsure of their responsibilities and powers and had nowhere to turn for definitive guidance except the courts.
- At the polls, voters in county after county were perplexed by inscrutable ballots.
- Officials turned people away at the polls, affecting African-Americans disproportionately.
- Overseas absentee ballots were pouring in through the first week and a half after the election, and no one seemed sure just how to treat them.
- The state's hodgepodge of election machinery failed to count some votes that voters meant to cast.

If the election had been as close in North Carolina as it was in Florida, we would have done much better.

Our State Elections Structure

At the core of our state elections structure is a central administrative authority—the State Board of Elections—that Florida completely lacked. Our state board is composed of three Democrats and two Republicans (or vice versa, when a Republican is governor), appointed by the governor from lists of nominees provided by the two parties. The state board appoints an executive director as the state's chief elections officer.

At the local level, North Carolina has administrative arms—county boards of elections—that Florida also completely lacked. Each county board is composed of two Democrats and one Republican (or vice versa, when a Republican is governor). The state board appoints the members of the county boards, again from lists supplied by the parties. Each county board then selects a county director of elections, who, to be protected from the winds of political influence, can be dismissed only by the state board.

By state statute, "The State Board of Elections shall have general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable."[25] County boards are directed by statute to carry out the instructions of the state board.[26]

So at the state level, North Carolina has a bipartisan board whose members are appointed from lists of names supplied by the parties. The closest structure in Florida was the Elections Canvassing Commission (composed of the governor, the secretary of state, and the head of the Elections Division of the secretary's office), but its only job was to certify election results. Florida's chief elections official was the secretary of state, an official elected in a partisan election. North Carolina's chief official is an appointee of the bipartisan board.

At the county level too, North Carolina has a bipartisan board appointed from lists supplied by the parties. The closest structures in Florida were the precinct-level election board (appointed by the supervisor before each election), which conducted the elections and reported results to the supervisor but had no authority over him or her; and the county canvassing board (composed of the county elections supervisor, the chair of the

Fixing Weaknesses in the System

North Carolina's fundamentally sound elections system has some notable weaknesses. To continue to ensure fair and efficient elections, we must do the following:

- Find money for counties to replace aged voting equipment with up-to-date, fully accessible technology
- Recruit precinct workers from all age groups and races, reflecting the makeup of the community
- Involve universities, community colleges, and public school systems in supplementing the training of precinct workers and in providing civics education for all citizens
- Improve voters' education on the importance of voting and on the basics: where to vote, how to vote, and in what districts they reside
- Guarantee fair market salaries for county elections directors and their staffs
- Ensure that county elections offices are adequately staffed
- Find money for the State Board of Elections to assist county boards with the heavy burdens imposed by law in maintaining the accuracy of voter registration lists
- Keep the statewide elections computer system up-to-date, and expand its capacity to bring to reality instant, paperless, electronic entry of voter registrations, through the acceptance of digitized signatures when voters register at the Division of Motor Vehicles, the Employment Security Commission, and other public agencies
- Support a legitimate test case for the U.S. Supreme Court to revisit *Buckley v. Valeo*, a 26-year-old decision that effectively constrains state regulation of campaign contributions[1]
- Provide a computer terminal in every county board of elections office, for the public and news media to review campaign finance reports and for candidates and parties to file campaign finance reports electronically

Note

1. Buckley v. Valeo, 424 U.S. 1 (1976).

county commissioners, and a judge), which was not a regularly convening board with full authority to conduct elections. In North Carolina the chief county elections official, the director, is selected by the bipartisan county board and can be dismissed only by the bipartisan state board. In Florida the county elections supervisors were elected in partisan elections, so some earned their offices as Democrats, others as Republicans.

Without the guidance of a central state board, the Florida elections supervisors and canvassing boards were on their own and went adrift at some very critical junctures and over some very basic issues. For instance, on the day after the election, when Gore began his election protest, the Palm Beach County Canvassing Board was uncertain whether it had the authority to conduct a manual recount of all the ballots. It asked Florida's secretary of state and attorney general for opinions and got conflicting answers. Unsure what else to do, it went to court to get a ruling and ended up as a party to a lawsuit that went all the way to the U.S. Supreme Court. In North Carolina a county board similarly unsure of such a basic question could have gotten an immediate, direct, and definitive answer from the office of the State Board of Elections, binding on the county board. There would have been no need for a lawsuit.

Our Election Protest Procedure

A main contributor to Florida's woes was its awkward procedure for pursuing an election challenge. As explained earlier, it used a bifurcated system: protests before certification of results, contests after. Gore initiated both kinds of challenges. So legal actions were going on simultaneously in the highest courts of the state and the highest court of the nation on the protest and on the contest. For the American public, keeping matters straight was difficult.

In North Carolina the procedure would have been much simpler and much easier to understand.[27] We do not have a bifurcated scheme. We have one proceeding, called a protest. The election results are not certified until this protest proceeding is completed. It may be begun by any voter or candidate, with the filing of a complaint with the county board of elections. If the county board determines that there is reasonable cause to believe that a violation or an irregularity has occurred, it conducts a hearing, to which it may subpoena witnesses, who testify under oath. The county board then makes findings of fact and conclusions of law and issues an order. The decision by the county board may be appealed to the State Board of Elections. The state board may then make its decision on the basis of the record of the hearing by the county board, or it may hold its own hearing. In its decision it may order votes recounted or order totals adjusted to correct for mistakes. In the most serious circumstances, it may order new elections. Only after the state board has issued its decision may the matter be appealed to a court. By statute the appeal goes to just one superior court—Wake County.

The North Carolina procedure has many advantages over the Florida one. First, since there is one proceeding instead of two, there cannot be duplicative activities going on at the same time.

Second, since the state board cannot certify the election results until the protest has been decided, the Florida

situation of already-certified results being tried in court cannot happen.

Third, all county boards conducting protest hearings work under the same rules and get the same directions from the state board. If the elections board in Forsyth County (to use an arbitrary example) were faced with a protest filed by Gore and were for any reason unsure of its powers and obligations, it would simply seek guidance from the state board and be bound by the guidance that it received. By contrast, when the Palm Beach County Canvassing Board needed advice, it asked both the secretary of state and the attorney general, and when it received conflicting advice, it went to court. That simply would not happen in North Carolina.

Fourth, if the same issue were presented to several county boards at the same time (say, to those of Buncombe, Cumberland, Mecklenburg, and New Hanover), just as Gore started protests simultaneously in Broward, Miami-Dade, Palm Beach, and Volusia counties, the state board could give consistent instructions to all the boards and could, if circumstances required, simply consolidate the hearings from the county boards and conduct one unified hearing itself.

Our Ballot Review Procedure

In Palm Beach County, acting in good faith and with the best of intentions, the elections supervisor designed a ballot that led 19,000 voters in her county alone to punch two holes in the presidential section, completely invalidating their presidential votes. To her credit, the supervisor had shown the ballot design to local leaders of both parties beforehand, and they had expressed no reservations. But she did not show it to anyone with elections expertise. Why not? Because there was no requirement that she do so, and no one to respond if she had asked.

The situation in North Carolina is completely different and vastly better. Before every election, all 100 county directors of elections send their ballot designs to the State Board of Elections office.[28] There the designs are reviewed for fairness and ease of use. Would the butterfly ballot have been rejected? That cannot be answered with certainty; no one now in the state board office remembers a butterfly ballot ever being submitted. But if one had been, there is an excellent chance that an experienced hand at the office would have said, "This looks confusing to me."

Our Procedures at the Polls

What about all the potential voters who were turned away at the polls on election day in Florida? Could the North Carolina situation have been just as bad?

No, for three reasons.

First, the bipartisan State Board of Elections would never have approved the use of a computer matching system for purging the voter rolls that was so grossly overinclusive, leading to the removal of names of people who were clearly alive, sane, and nonfelonious.

Second, in North Carolina, the counties remove names from the voter rolls only according to precise and detailed instructions from the state board. In Florida each county supervisor was on his or her own to figure out what to do with the computer lists. Some directly used the lists to wipe voters off the rolls; others held individual hearings on names listed; still others just threw the lists away. North Carolina's counties would all have been given the same instructions and would have been answerable to the state board for any deviation.

Third, and most important, we just do not turn people away at the polls as they did in Florida. There, if a person's name did not appear on the voter roll (because it had been removed according to the computer lists or otherwise) and the poll worker could not get in touch with the election supervisor's office to clear the problem up, the person was turned away. His or her vote was simply lost. In North Carolina, if a voter asserts that he or she is properly registered in that precinct but his or her name is not on the voter roll, the precinct worker will try to clear the matter up. If it cannot be resolved, however, the voter *is not turned away*. Instead, the voter may cast a "provisional ballot"—that is, a ballot that is secretly marked like all other ballots but is then stored apart from regular ballots with the other provisional ballots. At a later time, after the polls have closed, the voting status of all those who have cast provisional ballots is reviewed by the county board. The ballots of those who were properly registered are then counted.

A voter previously on the roll who has somehow been erroneously removed would not be turned away.

Our Absentee Ballot Situation

Florida's procedures, growing out of a twenty-year-old lawsuit settlement, required county canvassing boards to count overseas absentee ballots for *ten days after the election*, as long as they had been postmarked or signed and dated by election day. With the margin so extraordinarily close, both sides realized that these hundreds of votes could make the difference in the election, and both sides pressured the county boards to be more (or less) insistent on the postmark and signature requirements in accepting individual ballots. The county boards across the state responded with inconsistent and uncertain practices.

The problem stemmed from the fact that Florida's September primary is so close to its November general election that there is not time to get the overseas ballot applications in, the ballots out, and the returned ballots back before election day. In North Carolina, there is time between the May primary and the November election to process overseas absentee ballots.[29] The deadline is the close of polls on election day, the deadline set in general federal law.

Our Guidelines on Voter Intent

In January 2001 the Georgia secretary of state (that state's chief elections officer) wrote,

> *Could Florida's problems just as easily have been Georgia's problems? The answer is unquestionably yes. Like Florida, we have several different voting technologies. Like Florida, counties in Georgia have different methods of counting votes, with differing levels of accuracy. Like Florida, tens of thousands of voters cast ballots that did not register a choice in the presidential race.*[30]

The Georgia secretary of state was focusing on the Florida problem that ultimately led the U.S. Supreme Court to stop the recount procedure: methods of counting votes that varied from county

to county, without definitive guidelines and standard practices. This problem was tied to the state's election equipment.

As noted earlier, in 66 of Florida's 67 counties, four voting-machine systems were in use: mechanical-lever machines, punch-card ballots, modern optical-scan machines, and touch-screen machines. Each system has its problems, but punch-card ballots caused the greatest hue and cry in Florida.

Under any of these systems, voters may intend to vote but mark their ballots in ways that the machine cannot read: they may not pull the mechanical lever all the way down, not punch the chad completely out, not use the special marker to fill in the right blank, or not touch the screen in the right place. If this happens, the voter has not voted in that race, and the ballot is considered an undervote. Or the voter may mark two candidates in the same race, thus casting an overvote. The machine will not count a vote for that voter in that race.

It is generally accepted that in the overwhelming majority of cases, overvotes are accidental, but the situation with undervotes is more complicated.[31] Voters may intentionally decide not to cast a vote in a particular race, but this effect is usually found in races for offices lower on the ballot, not a phenomenon expected in a presidential race. One study of the 2000 election in California (covering 46 of the state's 58 counties) found the overvote rate in the presidential election to be 0.35 percent and the undervote rate to be 1.34 percent, for a combined total of 1.69 percent.[32] That means that 98.31 percent of voters cast valid, countable votes in the presidential race.

Some studies undertaken since the 2000 election have indicated that these problems are spread across several types of voting machines.[33] Other studies have indicated that punch-card voting machines have a measurably higher rate of these kinds of errors.[34] As a result, a number of jurisdictions, including Florida and Georgia, have decided to do away with punch-card voting.[35] In 2001 the North Carolina General Assembly passed legislation prohibiting counties from adopting punch-card machines, and directing counties that now have them to replace them by 2006.[36] It also specifically outlawed the use of butterfly ballots.[37]

In the 2000 election, North Carolina used all the same voting systems that Florida—and Georgia—did. We continue to use them all today.

However, in its December 12 decision stopping the recount process, the U.S. Supreme Court focused on the fact that the recounts that were under way varied from county to county in their guidelines and procedures. The Court was careful to note that it was not immediately concerned about counties using different kinds of machines: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."[38] Rather, the Court was concerned that the counties were counting without uniform guidelines: "Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards."[39]

We as a state have chosen not to disenfranchise voters because of a lack of technical compliance with voting instructions.

The Georgia secretary of state clearly thinks that the problem could have been just as bad in Georgia. The problem did arise in North Carolina on election night in 2000, but we handled it in the regular course of business. Watauga County uses the same punch-card voting machines that proved so problematic in Florida. In the November 2000 election, five seats on the county board of commissioners, all elected at large, were on the ballot. The five-highest vote getters would be elected. Two Republicans and two Democrats were clearly the top four, but for the fifth seat, just eight votes separated two candidates, one of each party. The one who trailed requested a machine recount, to which he was automatically entitled by the narrow margin. The machine recount resulted in a different outcome: the candidate who had initially trailed by eight votes led by two. The now-trailing candidate requested a manual recount.

The Watauga County director of elections, aware of the difficulties of the circumstance, contacted the State Board of Elections office—a luxury that the supervisors in Florida did not enjoy. The state board staff went over the appropriate procedures with her.[40] Those procedures contain guidelines for counting punch-card ballots—just what the U.S. Supreme Court said Florida lacked.

First, the guidelines provide that the voter's intent be the determining factor. We as a state have chosen not to disenfranchise voters because of a lack of technical compliance with voting instructions. Second, the guidelines provide that overvotes for a particular office not be counted for that office. Third, the guidelines provide detailed instructions on how the counting teams are to be assembled and how they are to handle the ballots.

Most important, the guidelines contain specific directions on undervotes: how to determine the voter's intent when the chad has not been cleanly punched out in a way that the machine can count. They require the counters to consider the entire ballot and the way in which the voter has punched it in the different races. If there is a consistent pattern—if, throughout the ballot, there are pregnant and dimpled chads, for example—then pregnant and dimpled chads are to be counted. The pattern indicates that is simply the way this voter marked his or her ballot. On the other hand, if the chads are cleanly punched in all races but one, and there is a dimple for that one, it is not to be counted. The

voter clearly knew how to mark the ballot. It should not be inferred that he or she meant to indicate a vote where the dimple is.

These are just the kinds of instructions that Florida lacked and that led the U.S. Supreme Court to its conclusion that equal protection was being violated in that state.

An Adaptable System in an Imperfect World

In any election, machines may malfunction, voters may make mistakes, elections officials may slip up. When the vote is as close as it was in Florida in 2000—and when the stakes are as high as they were then—such problems are magnified.

Florida suffered from an elections structure that could not quickly give accurate and controlling guidance to local officials who desperately needed it, from an awkward election protest scheme, from ballot designs that were not reviewed by anyone with expertise and experience, from a voter-list system that turned people away at the polls, from an absentee ballot system that unmercifully stretched out a confused situation, and from election machinery vulnerable to undervoting.

On every point the North Carolina structure and practice are superior. We have an administrative structure with the necessary authority and flexibility, more streamlined and understandable election protest and absentee ballot procedures, a system for review of ballot designs for fairness and ease of use, a provisional ballot system that protects people from being turned away at the polls, and state guidelines on determining voter intent.

On election night in 2000, we made mistakes. We have done so in every election in the past, and we probably will do so in every election to come. But North Carolina will never look as bad as Florida did that dreadful November.

Notes

1. John Mintz & Peter Slevin, *The Florida Fiasco*, WASHINGTON POST, June 1, 2001, at A1.

2. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1226 n.4 (Fla. 2000).

3. VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, Report of the United States Commission on Civil Rights, ch. 5, p. 5 (Washington, D.C.: June 2001).

4. STEVEN DONZIGER, AMERICA'S MODERN POLL TAX: HOW STRUCTURAL DISENFRANCHISEMENT ERODES DEMOCRACY, Report of the Advancement Project, 30 (Washington, D.C.: the Project, Nov. 7, 2001).

5. FLA. STAT. ch. 98.0975(4) (1999).

6. VOTING IRREGULARITIES, at ch. 5, p. 11.

7. DONZIGER, AMERICA'S MODERN POLL TAX, at 30.

8. VOTING IRREGULARITIES, at ch. 1, p. 20.

9. REVITALIZING DEMOCRACY IN FLORIDA, Report of the Governor's Select Task Force on Election Procedures, Standards and Technology, 55 (Tallahassee, Fla.: Mar. 1, 2001); VOTING IRREGULARITIES, at ch. 8, p. 5 n.44.

10. Ford Fressenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, NEW YORK TIMES, Nov. 12, 2001, at A1.

11. VOTING IRREGULARITIES, at ch. 8, p. 5.

12. *Id.* at 7.

13. Fressenden & Broder, *Study of Disputed Florida Ballots*, at A1.

14. The suit was brought under the predecessor to the current Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff through 1973ff-6.

15. FLA. ADMIN. CODE r. 1S-2.013.

16. Fressenden & Broder, *Study of Disputed Florida Ballots*, at A1.

17. *Id.*

18. Harris v. Florida Elections Canvassing Comm'n, 122 F. Supp. 2d 1317 (N.D. Fla. 2000).

19. Harris v. Florida Elections Canvassing Comm'n, 235 F.3d 578 (11th Cir. 2000).

20. FLA. STAT. ch. 101.5614(5) (2000).

21. Gore v. Harris, 772 So. 2d 1243, 1256 (2000).

22. Bush received 2,912,790 votes, Gore 2,912,253. *See id.* at 1247 n.4.

23. Bush v. Gore, 531 U.S. 1046 (2000).

24. Bush v. Gore, 531 U.S. 98, 106 (2000). The court cited examples:

> A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment. *Id.* at 106–07.

25. Section 163-22(a) of the NORTH CAROLINA GENERAL STATUTES (hereinafter G.S.). For a general discussion, *see* ROBERT P. JOYCE, THE PRECINCT MANUAL 2002 (Chapel Hill, N.C.: Institute of Gov't, The Univ. of N.C. at Chapel Hill, 2002).

26. G.S. 163-33(12).

27. At the time of the 2000 elections, North Carolina's protest provisions were found in the state Administrative Code at 8 NCAC 2.0001 through .0009. They have since been codified in the General Statutes in substantively the same form at G.S. 163-182.9 through -182.14.

28. G.S. 163-165.3.

29. Of course, 2002 has been an unusual year. For reasons unrelated to the 2000 presidential election, North Carolina's May primary was delayed until September.

30. CATHY COX, THE 2000 ELECTION: A WAKE-UP CALL FOR REFORM AND CHANGE, Report to the Governor and Members of the General Assembly, Executive Summary, 1 (Atlanta, Ga.: Jan. 2, 2001).

31. HENRY E. BRADY ET AL., COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES 8 (Berkeley: University of Cal., Berkeley, Sept. 2001).

32. *Id.*

33. CALIFORNIA INST. OF TECHNOLOGY AND MASSACHUSETTS INST. OF TECHNOLOGY CORP., VOTING: WHAT IS AND WHAT COULD BE 21 (Pasadena, Cal.; Cambridge, Mass.: CalTech/MIT Voting Technology Project, July 2001). In Presidential elections over the past decade, counties using optical-scan and mechanical-lever equipment each had a combined overvote and undervote total of 1.5 percent, counties with optical-scan machines 2.3 percent, and counties with punch-card machines 2.5 percent.

34. *Id.* at 29—for example, finding that the punch-card rate of combined overvotes and undervotes was significantly higher than the rates of other systems.

35. The U.S. Supreme Court gave states a push in this direction in its December 12 decision:

> This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely that legislative bodies nationwide will examine ways to improve mechanisms and machinery for voting. Bush v. Gore, 531 U.S. 98, 104 (2000).

36. G.S. 163-165.4A.

37. G.S. 163-165.4B.

38. *Bush*, 531 U.S. at 109.

39. *Id.*

40. They now are codified at 8 NCAC 09.0006. Before the Florida experience, they were not codified.

Emerging Issues: National Origin Discrimination in Employment

Joanna Carey Smith

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!
—Inscription from Statue of Liberty[1]

Over the past decade, the United States of America has welcomed more than 9 million legal immigrants.[2] In the year 2000, nearly 51 million temporary visitors came to the United States as tourists, business people, students, exchange visitors, specialized workers, and others.[3] Further, the Immigration and Naturalization Service estimates that in 1996 there were more than 5 million illegal immigrants in the country.[4]

This information underscores the special history of the United States. Almost all Americans can cite foreign countries as the homelands of their ancestors, who traveled to the land of opportunity. Such immigration has resulted in the much-used descriptions of America as a "melting pot" and "tossed salad." This shared history of starting anew has given America a national character unlike any other country. Accepting people from other places is ingrained in the national psyche.

North Carolina also is undergoing a shift in population demographics due to immigration. Within the state, Latinos are the fastest-growing population group.[5] North Carolina ranks fifth in the nation in the number of migrant and seasonal farm workers.

Despite the country's long history of welcoming immigrants, the terrorist attacks on September 11, 2001, have affected each American individually and all Americans collectively. Many are more suspicious of "strangers"—anyone who does not seem American—even as heterogeneous as Americans

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are. More telling, Americans have witnessed a retraction of their personal liberties in response to the tragedy. They must submit to increased security checks as they travel, and many are more suspicious of those traveling with them.[6]

At the federal level, Congress has enacted the USA PATRIOT Act, which gives broad authority to law enforcement officers to monitor and arrest people allegedly linked to terrorist activities, restricts the ability of some people to work in certain environments or with certain material, and allows disclosure of students' and employees' records to federal law enforcement officers without their consent.[7]

At the state level, North Carolina has been implementing a multifaceted response to potential bioterrorism attacks since 1999. Through its Division of Public Health, the state has dedicated resources to developing a statewide response plan, has conducted bioterrorism training for local governments, and has provided technical assistance to local governments developing their own response plans. The state also has authorized funds for forming regional teams to conduct public health surveillance, for purchasing information technology linking every local health department to the federal Centers for Disease Control and Prevention's Health Alert Network, for expanding the state's public health laboratory, and for creating a state bioterrorism team composed of experts in law enforcement, health, natural resources, environment, agriculture, transportation, research, and information technology.[8]

Additionally, North Carolina has enacted a law creating a statewide registry of laboratories that keep biological and chemical agents.[9] The law establishes civil penalties for those who violate the registry requirements.[10]

Most recently the state has received federal funds that will be used to implement a hospital bioterrorism preparedness program, to continue to develop and expand critical public health infrastructure, to review state laws to determine whether they provide for an adequate public health response to bioterrorism, and to conduct planning and training efforts.[11]

With this background it is not surprising that questions related to discrimination based on national origin have arisen. This article addresses the laws prohibiting national origin discrimination in employment, surveys relevant cases, and suggests steps that public-sector employers can take to demonstrate their commitment to diversity and tolerance in the workplace.

Federal Laws and Regulations on National Origin Discrimination

Title VII of the Civil Rights Act

The comprehensive federal law prohibiting discrimination in employment is Title VII of the Civil Rights Act.[12] It applies to all public and private employers with more than fifteen employees. Section 2000e-2 of Title VII makes it unlawful for employers to fail to hire, refuse to hire, discharge, or discriminate against people because of their race, color, religion, sex, or national origin. Further, employers may not "limit, segregate, or classify" employees or job applicants in any way that would deprive them of employment opportunities or adversely affect their status as an employee, because of their race, color, religion, sex, or national origin.

Despite the country's long history of welcoming immigrants, the terrorist attacks on September 11, 2001, have affected each American individually and all Americans collectively.

"National origin" is not defined in the statute. However, the Equal Employment Opportunity Commission (EEOC), the agency that enforces Title VII, has issued detailed regulations interpreting the statute, which give more substance to the term. The EEOC defines "national origin discrimination" as denial of equal employment opportunity because of a person's, or his or her ancestor's, place of origin; or because a person has the physical, cultural, or linguistic characteristics of a national origin group.[13] Through this definition one can infer that national origin encompasses accent, affiliation, "alienage" (alien status), ancestry, and appearance.

There are some exceptions to this broad prohibition on discrimination. For one, an employer may refuse to hire or promote a person, regardless of his or her national origin, when performance of the duties of the position, or access to the premises where any of the duties are to be performed, is subject to any federal requirement imposed in the interest of U.S. national security, and the person in question does not fulfill that requirement.[14] Note that this national security exception is not limited to national origin but includes any restriction imposed by the applicable federal statute or executive order.

An employer also may refuse to hire or promote a person because he or she fails to meet a bona fide occupational qualification (BFOQ). A "BFOQ" is a requirement reasonably necessary to the normal operation of a particular business or enterprise. For example, a restaurant may impose certain hairstyle restrictions to ensure compliance with state health codes, and such restrictions may affect certain ethnic or religious groups.[15] The EEOC narrowly interprets the BFOQ exception, however. If an employer adopted a policy restricting employment of people of a particular national origin, the employer would have to demonstrate how the policy was necessary to the normal operation of its business. There are few positions or services in which a particular national origin will interfere with the normal operations of an employer, including a government agency or a public school or university.[16]

The EEOC also has defined the types of characteristics protected by Title VII. The EEOC closely examines charges

alleging that individuals have been denied equal employment opportunity because of such national origin considerations as the following:

- Marriage to or association with people of a national origin group
- Membership in, or association with, an organization identified with or seeking to promote the interest of national origin groups
- Attendance at or participation in schools, churches, temples, or mosques generally used by persons of a national origin group
- A person's name or his or her spouse's name being associated with a national origin group[17]

Additionally, EEOC regulations prohibit harassment based on national origin, using the same standards as those applied to sexual and racial harassment.[18] Further, EEOC regulations presume that requiring employees to speak only English in the workplace, if applied to all employees all the time, is a burdensome term of employment, and prejudices a person's employment opportunities on the basis of national origin.[19] English-only requirements are discussed further on page 21.

Immigration Reform and Control Act

The Immigration Reform and Control Act (IRCA) not only prohibits national origin discrimination[20] but also prohibits discrimination on the basis of citizenship against citizens or nationals of the United States and "intending citizens."[21] To claim protection under the act, a noncitizen must be an alien who (1) has been lawfully admitted as a permanent resident, (2) has been lawfully admitted as a temporary resident, (3) has been admitted as a refugee, or (4) has been granted asylum.[22] The protections granted by IRCA do not apply to aliens who do not seek naturalization within certain time limits.[23]

IRCA applies to all public and private employers with three or more employees. However, IRCA specifically addresses any potential overlap with EEOC complaints, providing that an employer facing a charge of discrimination under Title VII will not face a charge of an unfair, immigration-related employment practice under IRCA.[24] Further, IRCA permits an employer to discriminate on the basis of citizenship if it is "otherwise required to comply with law, regulation, or executive order, or required by Federal, State, or local government contract." Likewise, an employer may discriminate on the basis of citizenship when "the Attorney General determines [it] to be essential for an employer to do business with an agency or department of the Federal, State, or local government."[25] IRCA also expressly allows an employer to give preference to citizens over noncitizens in hiring, recruitment, or fee-based referral for employment if two applicants are equally qualified.[26]

Section 1981 of the U.S. Code

Section 1981 of the U.S. Code, which was enacted to implement the Thirteenth Amendment to the U.S. Constitution, prohibits race discrimination in employment contracts.[27] This law originated in the Civil Rights Act of 1866 and the Voting Rights Act of 1870.[28] It provides in part that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ."[29] "Make and enforce contracts" is defined to include "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[30] In other words, any involvement in a contractual relationship is protected.

Section 1981 applies to all public or private employers; no minimum number of employees is required.[31] Although the text of the law appears to prohibit only race discrimination, the Supreme Court has concluded that Congress also intended to protect those "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."[32] A person therefore may be able to state a claim under Section 1981 on the basis of national origin discrimination.

The Supreme Court also has held that Section 1981 prohibits discrimination against aliens by public entities.[33] Further, the Fourth Circuit Court of Appeals, the federal appeals court with jurisdiction over North Carolina, has examined whether Section 1981 prohibits private discrimination on the basis of alienage.[34] The court concluded that the Voting Rights Act of 1870 barred such discrimination.[35] The court reasoned that "it would be strange indeed to hold . . . that this same grant of rights to 'all persons within the jurisdiction of the United States' does not also

confer on aliens protection against private discrimination in the making of contracts—under the plain language of the provision, 'all persons,' blacks and aliens, receive the same protections against discrimination."[36] In other words, a person may state a viable claim under Section 1981 against a public or private employer if he or she can demonstrate that he or she was prohibited from entering into an employment contract solely on the basis of alienage.

USA PATRIOT Act

Congress enacted the USA PATRIOT Act "to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes."[37] Most of the act is not relevant to employment discrimination based on national origin. However, one provision concerning biological weapons prohibits some people, including certain aliens, from working with "select agents" (substances such as certain viruses, bacteria, rickettsiae, fungi, toxins, and recombinant organisms).[38] First, the act prohibits any "alien illegally or unlawfully in the United States" from working with such agents.[39] Second, it prohibits a national of a country designated by the secretary of state as a supporter of international terrorism from working with select agents.[40] The term "alien" as used in the USA PATRIOT Act has the same meaning as in the Immigration and Nationality Act[41]—that is, "any person not a citizen or national of the United States."[42]

The USA PATRIOT Act further bars any person, regardless of alienage, from working with select agents if the person

- is under indictment for a crime punishable by imprisonment for a term exceeding one year;
- has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
- is a fugitive from justice;
- is an unlawful user of any controlled substance (as defined in Section 102 of the Controlled Substances Act);[43]
- has been adjudicated as a "mental defective" or has been committed to any mental institution; or
- has been discharged from the Armed Services of the United States under dishonorable conditions.[44]

If a government agency performs research using select agents, it should adopt a policy or procedure to ensure that the foregoing restrictions are in place and monitored so that no person is hired in violation of the USA PATRIOT Act provisions.[45] Violations of the restrictions may result in a fine or imprisonment.[46]

State Laws and Regulations on National Origin Discrimination

North Carolina likewise prohibits discrimination based on national origin. The state constitution states that "no person shall be denied the equal protection of the law; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."[47] In the employment context, the state has enacted the State Personnel Act (SPA)[48] and the Equal Employment Practices Act (EEPA),[49] both of which prohibit discrimination based on national origin. The SPA governs conditions of employment for most state employees, including classification of positions, compensation ranges, leave earnings and retention, and eligibility to file grievances. The SPA also has provisions applicable to all state employees, such as those pertaining to the privacy of personnel records. An employee subject to the grievance and dispute resolution procedures established by the SPA must bring a national origin complaint under it.[50]

Also for employees subject to the SPA, the Office of State Personnel has implemented an Unlawful Workplace Harassment Policy that covers national origin harassment and provides a mechanism for resolution of complaints.[51]

Any other North Carolina employee of a private or public employer can allege that his or her discharge violated the public policy against national origin discrimination stated in the EEPA.[52] To bring a complaint of wrongful discharge in violation of public policy, a person must show that he or she was performing his or her job competently and was discharged in violation of an express policy in the North Carolina Constitution or General Statutes.[53] The EEPA contains such a statement. However, the EEPA does not describe any remedies.[54] A court addressing a complaint of wrongful discharge therefore will look to Title VII cases in analyzing whether the discharge was discriminatory and in fashioning an appropriate remedy. As yet, though, there have been no reported North Carolina cases on wrongful discharge based on national origin.

Cases on National Origin Discrimination

Many cases in both the private and the public employment context have further analyzed (and occasionally clarified) the definition of national origin discrimination under Title VII.

Courts have recognized two general kinds of claims under Title VII: disparate treatment and disparate impact. Claims of "disparate treatment" based on national origin arise when an employer treats an individual or a group differently from others because of national origin. These claims often are referred to as "intentional discrimination" claims. To state a claim of disparate treatment, a plaintiff must initially show that he or she is a member of the protected class, that he or she was qualified for the position in question, that he or she suffered an adverse employment action, and that there is a connection between his or her protected status and the action taken (or that he or she was replaced by someone not in the protected class). Claims of "disparate impact" based on national origin arise when a facially neutral policy or practice that is applied uniformly nevertheless affects a group negatively. To state a claim of disparate impact, a person must allege that he or she is a member of a protected class and that an employer's policy or practice has negatively affected that class.

In either case a person must make more than a conclusory allegation of discrimination. The person may not merely state that he or she is of a certain national origin and has suffered an adverse employment action. The person must provide information that supports a connection between the two facts.[55]

There have been no reported cases

interpreting North Carolina law in this area. However, the federal Title VII cases are informative because North Carolina courts are likely to use federal case law in analyzing state-based claims.

Always Speaking English

As noted earlier, EEOC regulations state that requirements that employees speak only English in the workplace all the time, in the absence of a BFOQ, will be presumed to violate Title VII.[56] For example, one federal district court held that dismissal of an employee for speaking two words of Spanish violated Title VII because the employer could provide no business justification for so rigidly restricting the use of Spanish.[57] Other courts have supported the EEOC's interpretation.[58]

EEOC regulations allow an employer to require that employees speak only English at certain times if the employer shows that a "business necessity" justifies such a requirement."[59] Courts have repeatedly found a sufficient business necessity to justify English-only rules. *Garcia v. Gloor* was the first case to address the issue substantively.[60] In this case the employer prohibited employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers. The employer gave several business reasons for the prohibition: making all employee communications understandable to English-speaking customers; helping train Spanish-speaking employees in the use of English; and permitting non-Spanish-speaking supervisors to understand and oversee the work of their subordinates better. The plaintiff in the case was a bilingual employee who was eventually fired for continuing to speak Spanish at work. The Fifth Circuit Court held that Title VII did not protect language preferences and that the employer's restriction did not amount to national origin discrimination.

In *Garcia v. Spun Steak Co.*, the Ninth Circuit Court of Appeals also upheld an employer rule that employees speak English while on the job.[61] The rule was established to promote racial harmony and enhance worker safety. The court stated that Congress enacted Title VII with the expectation that management prerogatives would be left undisturbed to the greatest extent possible. The court then reasoned that Title VII does not confer substantive privileges and that an employer is not required to allow employees to express their cultural identity. The court held that the bilingual employee was not denied a privilege of employment by the English-only policy because it did not have a significant impact on a protected group of employees.[62] The court extended its reasoning from an earlier case in which it had held that a bilingual Hispanic radio host could not sue for being discharged because he refused to speak only English on his program.[63]

A district court in the Fourth Circuit accepted similar reasoning in a case brought by bilingual employees who challenged the employer-bank's English-only requirement.[64] The employees were permitted to speak Spanish only to assist Spanish-speaking customers; they were otherwise required to speak English. The court held that the policy did not constitute national origin discrimination. It accepted the reasoning from *Garcia v. Spun Steak Co.*, stating that an employer has a right to define the parameters of the privilege of employment, defining when and where employees may converse while on the job, and prohibiting some manners of speech. The court also stated, "[D]enying bilingual employees the opportunity to speak Spanish on the job is not a violation of Title VII. There is nothing in Title VII which protects or

provides that an employee has a right to speak his or her native tongue while on the job."[65]

The *Garcia v. Spun Steak Co.* analysis also was applied in a Pennsylvania case in which a district court held that the employer-church's English-only rule did not constitute national origin discrimination when applied to a bilingual Polish-American employee.[66] According to the court, the church had a valid business justification for the rule: it was trying to improve interpersonal relations at the church and prevent alienation of church employees from church members.[67]

In light of these cases, an employer's English-only rule may be upheld if the employer has a legitimate work-related basis for the rule. For example:

- Promoting harmony among racial or national origin groups
- Enhancing workers' safety
- Enhancing product quality
- Preventing employees from using language to isolate or intimidate members of other ethnic groups
- Alleviating tension in the workplace[68]

Accent

Allegations of discrimination based on accent fall within the EEOC's protection of the linguistic characteristics of a national origin group.[69] Clearly a person's accent is immediate information that he or she is not a native of America, and allegations that an employment decision was taken on the basis of an employee's or an applicant's accent will be closely reviewed by the EEOC and the courts.

Accent cases have arisen in a variety of employment contexts. In a case involving denial of a promotion, the Ninth Circuit Court of Appeals held that a Pakistani-born auditor could introduce into evidence an administrator's comment, made in a demeaning tone, that he could not understand the auditor's accent and could not see how the auditor expected to be a supervisor if the auditor could not communicate with people.[70] In another case involving denial of a promotion, the Sixth Circuit Court of Appeals affirmed a district court decision that there was national origin discrimination when the employer did not know the employee's national origin but did know that the employee had a foreign accent.[71] The employee was a native of Poland who had earned a master's degree in communications and whose knowledge of English exceeded that of the average adult American, even though she retained a pronounced accent. The district court found that she had been denied two promotions because of her accent, "which flowed from her national origin."[72]

In a demotion case, the Tenth Circuit Court of Appeals held that an employee of Filipino origin was improperly demoted from laboratory supervisor to laboratory technician with less responsibility because of opinions held by some faculty members that his national origin and accent made him unsuitable as a supervisor.[73]

In a termination case, the Eighth Circuit Court of Appeals held that there was an inference that a supervisor's ill will played a role in the decision to discharge an Iranian ultrasound technologist and that the former employee could therefore proceed with her claim of national origin discrimination.[74] The supervisor had ridiculed the employee's accent and had made comments about foreigners taking jobs from Americans. Further, on note cards at home, the supervisor had compiled a list of allegedly substandard ultrasound exams performed by the employee, but she had kept no such lists on other employees.

However, although an employee may establish an initial claim of national origin discrimination based on accent, an employer may offer legitimate reasons for the action. For example, when an employee's accent interferes with his or her job performance, an employer may legitimately consider this effect in making employment decisions. The Ninth Circuit Court of Appeals recognized this possibility in a case holding that an adverse employment decision may be predicated on a person's accent when—but only when—the accent materially interferes with job performance.[75] The position in question in the case was clerk for Honolulu's motor vehicle department. It required constant public contact, in which speaking clearly was an important skill.

Similarly, employers may legitimately consider communication skills in deciding which customer service representatives to terminate in a workforce reduction, because customer service positions necessarily require communication with the public.[76] Also, employers may examine an employee's history of insubordination and interpersonal difficulties with co-workers when considering whether or not to take disciplinary action. A person's speaking with an accent does not shield him or her from the reasonable work expectations of the employer.[77]

A federal district court in North Carolina held that an insurance salesman who spoke with a strong accent was discharged for reasons other than his accent.[78] Although the employee had been a successful insurance agent before and after employment with the defendant insurance company, the court found that he was terminated for not selling enough insurance. The court further found that he had failed to comply with the company's training requirements and had violated company policy by airing grievances in the work environment.

In an educational setting, courts have affirmed that the ability to communicate clearly can be a job requirement for teachers. The Ninth Circuit Court of Appeals upheld a decision that found no national origin discrimination when a community college did not hire a woman of Indian national origin as an instructor because of her difficulty communicating in the English language.[79] Other courts have held that denying a promotion or tenure to a faculty member who had difficulty speaking English did not violate Title VII.[80]

The EEOC and the courts will closely examine any job-related decision allegedly based on accent to ensure that the employer's decision is justified and not a proxy for national origin discrimination.[81]

Affiliations

As noted earlier, the EEOC also protects people from national origin discrimination based on their affiliations, such as marriage to a member of a national origin group or participation in schools, churches, temples, or mosques generally used by people of a national origin

group.[82] This interpretation may go beyond the original intent of the statute and is not a common basis of complaint. However, it has been accepted by some courts.

In one case a female employee brought a complaint alleging that she was discharged, was refused reemployment, and was then barred from other employment because of her former employer's persistent release of false and derogatory references.[83] The District of Columbia Circuit Court of Appeals held that if the employee's discharge was based on her sex or her spouse's Arabic ancestry, the action constituted discrimination in violation of Title VII. In another case a district court held that the plaintiff's allegation of discrimination based in part on his parents' national origin was sufficiently associated with a charge of discrimination based on his own national origin.[84]

Employers should use these cases as reinforcement that an employment decision must be based on the employee's job-related qualifications or performance, rather than on his or her outside affiliations or associations. This is particularly true in the public sector, where the government should be especially attentive to an employee's right to freedom of association and should ensure that the employee's constitutional rights are honored.

Alienage or Citizenship

The EEOC does not consider an employment decision based on citizenship to violate Title VII unless it has the purpose or effect of discriminating against a person on the basis of national origin.[85]

The leading case under Title VII is *Espinoza v. Farah Manufacturing Company*.[86] In this case the Supreme Court held that Title VII protects aliens from illegal discrimination but does not make discrimination based on citizenship or alienage illegal. In *Espinoza* the employer refused to hire the plaintiff because of its long-standing policy of not hiring aliens. The plaintiff alleged that the refusal to hire her because of her alienage constituted national origin discrimination. The Court rejected this argument, finding no indication that the employer's policy against employment of aliens had the purpose or effect of discriminating against people of Mexican national origin. The Court noted that U.S. citizenship was required for federal employment and that interpreting "national origin" to encompass citizenship would result in a determination that Congress flouted its own declaration of policy. The Court found no reason to believe that "national origin" should be broader in scope for private employers than for the federal government.[87]

The line between citizenship and national origin is not always clear. For example, a Mississippi court heard the claim of an American who alleged that, after a Canadian consulting group began managing the defendant corporation, he was terminated in favor of a Canadian citizen who was less experienced and less qualified. The Canadian employer tried to have the case dismissed because the plaintiff stated his American citizenship as the basis of the complaint. The employer argued that Title VII does not protect citizenship. However, the court held that the American employee had intended to state a claim of national origin discrimination and that he could proceed with his case.[88]

An applicant, an employee, or a former employee therefore cannot succeed in a Title VII claim of national origin discrimination by alleging solely that his or her citizenship was the basis for the adverse employment decision. Other indicators of national origin discrimination must be involved to form the basis of the claim, and an applicant, an employee, or a former employee should not rely on the court to recraft a citizenship complaint into a national origin complaint. Employers should remember, however, that IRCA protects "intending citizens"[89] and that Section 1981 of the U.S. Code has been held to prohibit discrimination by public and private entities on the basis of alienage. So an applicant's, employee's, or former employee's claim based on citizenship alone may be actionable under other federal statutes.[90]

"American" National Origin

Courts have considered actions taken on the basis of an employee's *American* national origin to be a violation of Title VII. For example, the Seventh Circuit

Court of Appeals has stated, "[W]e may assume that just as Title VII protects whites from discrimination in favor of blacks as well as blacks from discrimination in favor of whites, so it protects Americans of non-Japanese origin from discrimination in favor of persons of Japanese origin."[91] Similarly a federal district court has held that "employment discrimination against American citizens *based merely on country of birth*, whether that birthplace is the United States or elsewhere, contradicts the purpose and intent of Title VII, as well as notions of fairness and equality."[92] These holdings are analogous to "reverse" race discrimination decisions.

One important consideration in these types of claims is whether the employer is an American company or a foreign one. Many countries have treaties with the United States that permit employment decisions to be made on the basis of citizenship.[93] So, for example, the Seventh Circuit Court of Appeals held that a Japanese company's preference for hiring Japanese citizens in executive positions did not constitute national origin discrimination against American citizens, in large part because of the express terms of a treaty of friendship between the two countries.[94] A treaty supersedes Title VII, and these holdings are an important reminder that national origin and citizenship are not interchangeable in alleging discrimination.

Given America's history of immigration, it is not surprising that someone may consider himself or herself to be an American, yet maintain ties to another country or heritage. Such a self-image was at issue in a case in which an Italian-American former employee of an Italian international airline alleged that his failure to be promoted to personnel manager for employees in the United States, Mexico, and Canada was discrimination on the basis of his American national origin.[95] The court framed the issue as "whether the plaintiff's national origin is American, because he was born in this country, or Italian, because his ancestors were born in Italy."[96] The employee contended that he had two national origins, but the court concluded that his national origin was Italian since his ancestors were Italian, and it held that he failed to state a claim when he was replaced by an Italian.[97] The court noted that "perhaps only American Indians can claim to be of American national origin for purposes of Title VII."[98] This reasoning was rejected in a later case. The court stated, "Under that rationale, then no one born in the United States, not even an American Indian (whose ancestry is actually Asian), could ever sue under Title VII for national origin discrimination. This would be an absurd result and is clearly foreclosed by the explicit holding in *Espinoza*."[99]

A better approach may be to analyze such claims on a case-by-case basis, determining how removed a person is from his or her ancestors' country (or countries) of origin or whether the person retains the physical, cultural, and linguistic characteristics of his ancestors' country (or countries) of origin as described by the EEOC. For example, a sixth-generation Italian-American who speaks fluent, accent-free English, dresses in American fashion, and maintains no connection to Italy might be considered to be of American national origin whereas a first-generation Italian-American might not.

Ancestry

Ancestry is the original and undisputed basis of coverage for national origin discrimination.[100] As one court has stated, "[N]ational origin on its face refers to the country where a person was born, or more broadly, the country from which his or her ancestors came."[101] Ancestry can apply to natives of the United States of America as well as to those of other countries.

Current geographical boundaries and divisions are not necessary to state a claim of national origin discrimination based on ancestry. Ancestry is covered even if the country of origin no longer exists. For example, the Ninth Circuit Court of Appeals ruled that a native of Serbia might be protected under Title VII even though Serbia was not a country at the time of the case.[102] Further, in another case that court ruled that a member of an Indian tribe might state a claim for national origin discrimination when he was not hired for a position because of his tribal membership.[103] The court held that a claim of national origin discrimination arises when discriminatory practices are based on the place in which one's ancestors lived. This definition does not require identification of a country. As the court stated, "[T]he different Indian tribes are generally treated as domestic dependent nations that retain limited powers of sovereignty."[104]

A person's ethnic background—not tied to a particular country or region—also may be the basis for a claim of national origin discrimination. For example, one court has found a native-born American of Acadian descent (Acadians are French people who settled in Louisiana) to be protected by Title VII.[105] Another court has held that being a Gypsy (one of a group that migrated from India to Europe in the fourteenth or fifteenth century and today maintains a migratory way of life) falls within Title VII's protection, making it an unlawful employment practice for an employer to discriminate against a person on the basis of that ancestry.[106]

Employers should ensure that ancestry is not used as a basis for employment decisions. More important, they should reinforce to all employees that ancestry is broader than a person's country of origin and can encompass heritages such as tribal status and ethnicity.

Appearance

A person's appearance, when related to his or her national origin, generally should not be a basis of consideration in a job-related decision. In a Louisiana case, two employees (one of Filipino ancestry and one of African-American ancestry) brought a complaint of national origin discrimination following their terminations.[107] The district court held that supervisors' comments about the plaintiffs' looks and skin complexion provided enough evidence of such discrimination.

Another district court has stated that having the appearance of a particular national origin group, without having the corresponding ancestry, is a sufficient basis for a claim of national origin discrimination. In a case involving a denial of a promotion and a hostile work environment based on the plaintiff-employee's alleged American Indian ancestry,[108] the employee had no discernible

Indian ancestry based on genealogical and census data. Additional information, however, demonstrated that the employee reasonably believed himself to be of Indian ancestry and that the employer treated him as being of Indian descent. The court stated, "[T]he employer's reasonable belief that a given employee is a member of a protected class . . . controls this issue." The court held that "objective appearance and employer perception are the basis for discrimination and . . . the key factors relevant to enforcing rights granted members of a protected class."[109]

These cases teach that appearance is not a valid basis for an employment decision. Employers should carefully evaluate an applicant's or employee's knowledge, skills, and abilities and use the resulting information to reach a decision. Employers should never make presumptions about national origin based on the way an applicant or an employee looks or dresses.

Conclusion

National origin discrimination has not been as pervasive a public problem in the workplace as race and sex discrimination have been. In fiscal year 2000, the EEOC received 7,800 national origin complaints.[110] For that same period, it received more than 59,000 Title VII complaints (race, sex, national origin, and religion).[111] However, national origin complaints may rise in the next few years. Both the increase in the number of immigrants to the United States and the focused world efforts against terrorism may cause some Americans to reconsider their ideas about national origin and the country's character. As national change and international unrest continue, managers must take care not to base employment decisions on factors unrelated to a person's ability to perform a particular job.

An employer can demonstrate its commitment to diversity and tolerance in the workplace in several ways. First, it can publicize its policies affirming commitment to and support of equal employment opportunity. Second, it can offer supervisors and managers training on national origin discrimination, defining permissible and impermissible factors to consider in making employment decisions, identifying harassing behaviors in the workplace among coworkers, and demonstrating how to minimize the potential for an unwelcome work environment for any employee. Third, it can periodically inform employees of processes available to address concerns across the organization about national origin harassment or discrimination, and promptly address any concerns brought forward.

Moreover, in times of uncertainty and crisis, public employers have a broad responsibility to ensure that minority opinions are heard and respected. Public employees and citizens must trust that the government will not squelch their opinions.[112] To preserve governmental integrity, public employers should actively provide employees, clients, and community members with access to opinions, ideas, and perspectives that cut across nationalities.

Notes

1. From the poem entitled *The New Colossus*, by Emma Lazarus.

2. *See* www.ins.gov for statistics related to immigration to the United States. From 1991 to 2000, the United States averaged 900,000 legal immigrants per year.

3. *See* information available from the United States Dep't of Commerce, Office of Travel and Tourism Industries, online at www.tinet.ita.doc.gov/view/q-2000-1st-001/index.html?ti_cart_cookie=20020411.190624.06599. This number is a marked increase from fiscal year 1999, in which 31 million temporary visitors came to the United States. *See* THE 1999 STATISTICAL YEARBOOK tbl. 35, available online at www.ins.gov/graphics/aboutins/statistics/Temp99tables.pdf.

4. IMMIGRATION AND NATURALIZATION SERV., THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION 56 (Washington, D.C.: INS, May 1999), available online at www.ins.gov/graphics/aboutins/repsstudies/report.pdf.

5. *See* North Carolina Office of Minority Affairs, Hispanic/Latino Office, at http://minority affairs.state.nc.us/hispaniclatino/hislatfacts.htm.

6. The American-Arab Anti-Discrimination Committee cites knowledge of more than sixty cases in which people perceived to be Arab have been expelled from aircraft during or after boarding on the grounds that passengers or crew do not like the way they look. For more information about reports of discrimination against Arab-Americans following the September 11 attacks, see the American-Arab Anti-Discrimination Committee fact sheet available online at www.adc.org/index.php?id=282.

7. The formal name for this law is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. Pub. L. No. 107-56, 115 Stat. 271 (2001).

8. *See* www.ncgov.com/asp/subpages/task_force_summary.asp.

9. H. 1472: An Act Directing the Department of Health and Human Services to Establish a Biological Agents Registry, and Imposing Civil Penalties for Violation of Registry Requirements. It became effective on January 1, 2002, and is codified at Section 130A-149 of the NORTH CAROLINA GENERAL STATUTES (hereinafter G.S.).

10. The civil penalty for a willful or knowing violation of the law can be up to $1,000 per instance, and each day of a continuing violation is a separate offense. j27
G.S. 130A-149(f).

11. For a more thorough discussion of the state's actions related to bioterrorism preparedness, *see* Jill D. Moore's article entitled "Unnatural Disasters: Bioterrorism and the Role of Government," in POPULAR GOVERNMENT, Summer 2002, at 4. North Carolina also has established an official Web site with comprehensive information related to the state's efforts to improve safety and security in the state: www.ncgov.com/asp/subpages/safety_security.asp.

12. 42 U.S.C. §§ 2000e through 2000e-17.

13. 29 C.F.R. § 1606.1.

14. 29 C.F.R. § 1606.3. *See also* 42 U.S.C. § 2000e-2(g).

15. 29 C.F.R. § 1606.4. *See also* 42 U.S.C. § 2000e-2(e).

16. A discussion of certain employment restrictions relevant to some public-sector positions appears in the section on the USA PATRIOT Act later in this article.

17. 29 C.F.R. § 1606.1.

18. 29 C.F.R. § 1606.8. Courts, including the Fourth Circuit Court of Appeals (whose decisions affect North Carolina), have accepted national origin harassment claims as well. *See* Amirmokri v. Baltimore Gas & Electric Co., 60 F.3d 1126 (4th Cir. 1995); Boutros v. Canton Regional Transit Auth., 997 F.2d 198 (6th Cir. 1993).

19. 29 C.F.R. § 1607(a).

20. 8 U.S.C. § 1324b(a)(1)(A).

21. 8 U.S.C. § 1324b(a)(1)(B).

22. 8 U.S.C. § 1324b(a)(3)(B).

23. *Id.*

24. 8 U.S.C. §§ 1324b(a)(2)(B), 1324b(b)(2). Section 1324b(b)(2) states, in part, "[N]o charge may be filed respecting an unfair immigration-related employment practice . . . if a charge with respect to that practice based on the same set of facts has been filed with the EEOC under Title VII of the Civil Rights Act

of 1964, unless the charge is dismissed as being outside the scope of such title."

25. 8 U.S.C. § 1324b(a)(2)(C).

26. 8 U.S.C. § 1324b(a)(4).

27. The Thirteenth Amendment (Slavery and Involuntary Servitude) to the Constitution reads in its entirety:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

28. *See* Civil Rights Act of 1866 ch. 31, § 1, 14 Stat. 27 (1866); Voting Rights Act of 1870 ch. 114, § 18, 16 Stat. 140 (1870). *See also* Runyon v. McCrary, 427 U.S. 160, 168–70 (1976).

29. 42 U.S.C. § 1981(a). Before the 1991 amendments, this section constituted the entire text of Section 1981.

30. 42 U.S.C. § 1981(b).

31. 42 U.S.C. § 1981(c). There was some discussion before the 1991 amendments about whether Section 1981 covered discrimination by private entities. However, the discussion was rendered moot by the addition of this section, which reads in its entirety, "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." *See* Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991).

32. St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). *See also* Alizadeh v. Safeway Stores, 802 F.2d 111, 114 (5th Cir. 1986) (holding that white woman married to man of Iranian national origin established claim under Section 1981 by alleging that her employer discriminated against her because her husband was of "a race other than white"); Ortiz v. Bank of America, 547 F. Supp. 550, 568 (E.D. Ca. 1982) (holding that plaintiff of Puerto Rican descent and accent who was denied promotions and eventually terminated had cause of action under Civil Rights Act).

33. *See* Graham v. Richardson, 403 U.S. 365, 377 (1971).

34. *See* Duane v. GEICO, 37 F.3d 1036 (4th Cir. 1994).

35. *Id.* at 1041. *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426 (1968); Runyon v. McCrary, 427 U.S. 160, 170–71 (1976).

36. *Duane*, 37 F.3d at 1043. This reasoning was later adopted by the Second Circuit Court of Appeals in Anderson v. Conboy, 156 F.2d 167 (2nd Cir. 1998) (holding that Section 1981 proscribes alienage discrimination by private entities with respect to right to make and enforce contracts).

37. Pub. L. No. 107-56, 115 Stat. 272 (2001).

38. Pub. L. No. 107-56, § 817, 115 Stat. 272, 385 (2001). The biological weapons provisions are found at 18 U.S.C. §§ 175–178. Select agents are defined in 42 C.F.R. § 72.6(j) and specified in 42 C.F.R. pt. 72, app. A. They do not include biological agents or toxins exempted in 42 C.F.R. § 72.6(h) and 42 C.F.R. pt. 72, app. A.

39. Pub. L. No. 107-56, § 817, 115 Stat. 272, 386 (2001), *amending* 18 U.S.C. §§ 175–178 (Biological Weapons).

40. *Id.* Currently the secretary of state has determined that Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria are banned countries for this purpose.

41. Pub. L. No. 107-56, § 817, 115 Stat. 272, 386 (2001), *citing* the Immigration and Nationality Act at 8 U.S.C. § 1101(a)(3).

42. 8 U.S.C. § 1101(a)(3).

43. 21 U.S.C. § 802.

44. Pub. L. No. 107-56, § 817, 115 Stat. 272, 386 (2001).

45. The Bioterrorism Act recently enacted by Congress to strengthen the nation's preparedness for bioterrorism and other public health emergencies also requires background checks and registration of people working with select agents. Pub. L. No. 107-188, § 201, 116 Stat. 594, 637–646 (2002). Also, if an employer uses an outside company to perform any criminal record (or other background) check on applicants for these positions, it must comply with the notice and use provisions of the Fair Credit Reporting Act. A detailed discussion of the requirements of that act is beyond the scope of this paper. It can be found at 15 U.S.C. §§ 1681–1681u.

46. Pub. L. No. 107-56, § 817, 115 Stat. 272, 386 (2001).

47. N.C. Const. art. I, § 19.

48. G.S. 126-16. This section reads as follows: "All State departments and agencies and all local political subdivisions of North Carolina shall give equal opportunity for employment and compensation, without regard to . . . national origin, to all persons otherwise qualified, except where specific age, sex or physical requirements constitute bona fide occupational qualifications [BFOQ] necessary to proper and efficient administration." Note that the BFOQ exception does not include national origin.

49. G.S. 143-422.1 through -422.3. The EEPA states, "[I]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of . . . national origin." G.S. 143-422.2.

50. Current and former state employees must bring their complaints of national origin discrimination under G.S. 126-34.1(a)(2) and -34.1(a)(10). Applicants for state employment must bring their complaints under G.S. 126-34.1(b). These statutes provide for a hearing before the Office of Administrative Hearings.

51. 25 N.C.A.C. § 1C.0214.

52. One of the fundamental principles of employment in North Carolina is employment at will. *See* Sides v. Duke Univ., 74 N.C. App. 331, *disc. review denied*, 314 N.C. 331 (1985). *See also* Kurtzman v. Applied Analytical Indus., 347 N.C. 329 (1997). "Employment at will" means that either the employer or the employee may terminate the relationship at any time for any reason or for no reason, but an employee may not be discharged for an illegal reason. There is a court-made, or common law, exception to this doctrine: an employer may not discharge an employee if doing so would contravene public policy.

53. *See* Considine v. Compass Group, USA, 145 N.C. App. 314, 320–21 (2001).

54. An employee may bring a claim under Title VII and a concurrent wrongful discharge claim based on a violation of North Carolina public policy. *See* Hughes v. Bedsole, 913 F. Supp. 420, 429 (E.D.N.C. 1995), *aff'd*, 48 F.3d 1376 (4th Cir. 1995). However, in enacting the EEPA, "the North Carolina legislature chose not to provide any remedies beyond those available under federal discrimination statutes. It is unlikely that the North Carolina courts would disturb this legislative decision by providing a common law remedy for wrongful discharge beyond the procedure envisioned by Title VII." Percell v. IBM, 765 F. Supp. 297, 302 (E.D.N.C. 1991), *aff'd*, 23 F.3d 402 (4th Cir. 1994). *See also* Spagnuolo v. Whirlpool Corp., 467 F. Supp. 364 (W.D.N.C. 1979). There is no legislative history to explain why the legislature chose not to establish a separate remedial scheme. Note, though, that a tort claim, such as wrongful discharge in violation of public policy, may be heard in a state court instead of a federal court. In that circumstance a discharged employee has a longer period in which to file a complaint.

55. *See, e.g.*, Bender v. Suburban Hosp., 159 F.3d 186 (4th Cir. 1998); Simpson v. Welch, 900 F.2d 33 (4th Cir. 1990).

56. 29 C.F.R. § 1606.7(a).

57. Saucedo v. Brothers Well Serv., 464 F. Supp. 919 (S.D. Tex. 1979).

58. EEOC v. Premier Operator Servs., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) ("[A] blanket policy or practice prohibiting the speaking of a language other than English on an employer's premises at all times, except when speaking to non-English speaking customers, violates Title VII's prohibition against discrimination based on national origin"); EEOC v. Synchro-Start Prods., 29 F. Supp. 2d 911 (N.D. Ill. 1999) (holding that employer's English-only rule supported national origin claim under Title VII). Some courts have rejected the EEOC presumption against English-only policies, however. *See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993) ("[W]e are not aware of

. . . anything in the legislative history to Title VII that indicates that English-only policies are to be presumed discriminatory"); Long v. First Union Corp. of Va., 894 F. Supp. 933, 940 (E.D. Va. 1995) ("The EEOC's determination that the mere existence of an English-only policy satisfies the plaintiff's burden of proof is not consistent with the drafting of the statute but is rather agency-created policy. The plaintiff still bears the burden of showing a *prima facie* case of discrimination"); Kania v. Archdiocese of Philadelphia, 14 F. Supp. 2d 730, 735–36 (E.D. Pa. 1999) ("Despite the deference ordinarily due to official administrative guidelines and regulations, such guidelines and regulations may not exceed the authority of the statute they purport to interpret. . . . Therefore, the Court shall disregard the EEOC Guidelines in determining whether the Defendants have engaged in national origin discrimination"). All these cases are discussed in more detail within this section.

59. 29 C.F.R. § 1606.7(b).

60. Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).

61. *Garcia v. Spun Steak Co.*, 998 F.2d 1480. *See also* Tran v. Standard Motor Prods., 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998) (holding that policy requiring employees to speak English during meetings and while working did not constitute hostile work environment in violation of Title VII when there was legitimate business reason for enacting policy, no evidence that policy was strictly enforced or any employee was ever disciplined for violating policy, and no adverse action or effect on employee-complainant).

62. *Id.* at 1487–88.

63. Jurado v. Eleven-Fifty Corp., 813 F.3d 1406 (9th Cir. 1987).

64. Long v. First Union Corp. of Va., 894 F. Supp. 933 (E.D. Va. 1995). The Fourth Circuit Court of Appeals affirmed this opinion in *Long*, an unpublished decision at 86 F.3d 1151, 1996 WL 281954 (4th Cir. 1996). With an "unpublished" decision, the text of the case is available for review, but the case cannot be cited as precedent for future claims.

65. *Long*, 894 F. Supp. at 941.

66. Kania v. Archdiocese of Philadelphia, 14 F. Supp. 2d 730 (E.D. Pa. 1999).

67. Although Title VII contains an exemption for religious organizations with respect to employment discrimination based on religion, the exemption does not extend to a religious employer's alleged discrimination based on other protected characteristics. 42 U.S.C. § 2000e-1(a).

68. *See also* Garcia v. Gloor, 628 F.2d 264, 267 (5th Cir. 1980).

69. 29 C.F.R. § 1606.1.

70. Hashem v. California State Bd. of Equalization, 200 F.3d 1035 (7th Cir. 2000).

71. Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d. 980 (6th Cir. 1980).

72. *Id.* at 981.

73. Carino v. University of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984).

74. Hossaini v. Western Mo. Medical Ctr., 97 F.3d 1085 (8th Cir. 1996).

75. Fragante v. Honolulu, 888 F.2d 591, 596 (9th Cir. 1989).

76. Meng v. Ipanema Shoe Corp., 73 F. Supp.2d 392 (S.D.N.Y. 1999).

77. Bozicevich v. American Airlines, 17 BNA Fair Empl. Prac. Cas. 247 (S.D.N.Y. 1977).

78. Bell v. Home Life Ins. Co., 596 F. Supp. 1549 (M.D.N.C. 1984).

79. Gideon v. Riverside Community College Dist., 43 BNA Fair Empl. Prac. Cas. 910 (C.D. Cal. 1985), *aff'd*, 800 F.2d 1145 (9th Cir. 1986).

80. *See* Kureshy v. City Univ. of N.Y., 561 F. Supp. 1098 (E.D.N.Y. 1983) (holding that associate professor of geology, a native of India who was denied promotion to full professor on four occasions and ultimately denied tenure, could not show that he was exceptional teacher as required by university); Hou v. Pennsylvania, Dep't of Educ., Slippery Rock State College, 573 F. Supp. 1539 (W.D. Pa. 1983) [holding that associate professor of mathematics of Chinese origin who was denied promotion to full professor six years in a row made *prima facie* case of national origin discrimination but that college offered legitimate and nondiscriminatory reasons for decision (average teaching and inadequate committee work)].

81. 45 Fed. Reg. 85,632 (Dec. 29, 1980).

82. 29 C.F.R. § 1606.1.

83. Shehadeh v. Chesapeake & Potomac Tel. Co. of Md., 595 F.2d 711 (D.C. Cir. 1978).

84. Fix v. Swinerton and Walberg Co., 320 F. Supp. 58 (D. Colo. 1970).

85. 29 C.F.R. § 1606.5.

86. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

87. *Id.* at 91.

88. McMillan v. Delta Pride Catfish, 1998 WL 911775 (N.D. Miss. 1998).

89. 8 U.S.C. § 1324b(a)(1)(B).

90. *See* Graham v. Richardson, 403 U.S. 365, 377 (1971); Duane v. GEICO, 37 F.3d 1036 (4th Cir. 1994).

91. Fortino v. Quasar Co., a Div. of Matsushita Elec. Corp. of America, 950 F.2d 389, 392 (7th Cir. 1991).

92. Thomas v. Rohner-Gehrig Co., 582 F. Supp. 669, 675 (N.D. Ill. 1984) (emphasis added).

93. *Id. See also* MacNamara v. Korean Air Lines, 862 F.2d 1135, 1144 (3d Cir. 1988) (holding that Korean company had right to choose citizens of its own nation as executives); Wickes v. Olympic Airways, 745 F.2d 363, 368 (6th Cir. 1984) (holding that 1951 treaty between United States and Greece afforded Greek corporations only a narrow right to discriminate in favor of Greek citizens in filling managerial and technical positions in Greek airline's American-based offices and did not give Greek airline license to discriminate against or among non-Greek citizens hired for positions not covered by treaty on basis of race, sex, national origin, or any other factors prohibited by Michigan law).

94. *Fortino* at 393–94. The court found that the company treated Japanese-American employees the same as other American employees. This finding supported the company's defense that it was making decisions on the basis of citizenship, not national origin.

95. Vicedomini v. Alitalia Airlines, 1983 WL 616 (S.D.N.Y. 1983).

96. *Id.* at *4.

97. *Id.*

98. *Id.*

99. *McMillan*, 1998 WL 911775, at *2.

100. *See* 42 U.S.C. § 2000e(b).

101. Thomas v. Rohner-Gehrig Co., 582 F. Supp. 669 (N.D. Ill. 1984).

102. Pejic v. Hughes Helicopters, 840 F.2d 667 (9th Cir. 1988). At the time, Serbia was a part of Yugoslavia.

103. Dawavendewa v. Salt River Project Agric. Improvement and Power Dist., 154 F.3d 1117, 1119 (9th Cir. 1998).

104. *Id.* at 1120. The EEOC has provided guidance in this area through a Policy Statement on Indian Preference under Title VII (1998). It states that the exemption for Indian preferences found at 42 U.S.C. § 2000e(i), which permits businesses near an Indian reservation to announce publicly an employment practice of preferential treatment for any person who is an Indian living on or near a reservation, does not allow discrimination based on tribal affiliation.

105. Roach v. Dresser Indus. Valve Instrument Div., 494 F. Supp. 215 (W.D. La. 1980).

106. Janko v. Illinois State Toll Highway Auth., 704 F. Supp. 1531 (N.D. Ill. 1989).

107. Johnson v. Fleet Mortgage Corp., 878 F. Supp. 71 (E.D. La. 1995).

108. Perkins v. Lake County Dep't of Utils., 860 F. Supp. 1262 (N.D. Ohio 1994).

109. *Id.* at 1277–78.

110. *See* www.eeoc.gov/stats/origin.html.

111. *See* www.eeoc.gov/stats/vii.html.

112. In THE LOGIC AND LIMITS OF TRUST, Bernard Barber argues that trust is fundamentally about expectations. Citizens expect technically competent role performance from their government, which may involve "expert knowledge, technical facility, or everyday routine performance." Additionally, public employees must have cognitive and moral expectations for themselves, other employees, and the governmental system. BARBER, THE LOGIC AND LIMITS OF TRUST 9 (New Brunswick, N.J.: Rutgers Univ. Press, 1983).

Digitally Connecting Local Governments in North Carolina

Philip Young

Long before computers existed, people networked—through social events, shared academic experiences, professional organizations, work, neighbors, relatives, friends of friends. Networking is as old as conversation and the bare feet that originally carried messages back and forth within a village or from village to village. Papyrus and ink, roads and horses, waterways and ships led to significant leaps in networking in the ancient world as these new technologies emerged and civilization spread. In modern industrial nations, especially the United States, networking technology has vastly expanded to include telephones, fax machines, overnight mail, e-mail, and the Internet. Even with all the advances in technology, the reasons for networking remain the same: to share or find reliable and accurate information, when it is needed, to solve problems, maintain and create relationships, and generate a sense of community.

As a planning director in a city of 20,000, with 3 planners, I find the listserv to be like having a planning staff of 10.

—Jeff Hatling, planning director, Kernersville (member of the ncplan listserv)

The Institute of Government (IOG) at The University of North Carolina at Chapel Hill currently helps North Carolina local and state officials network successfully among themselves and with IOG faculty. The IOG functions as a hub for reliable and accurate information about legal issues in various areas of governmental concern, such as zoning, contracting, purchasing, local government law, and criminal law. This article describes one of the IOG's current networking technologies, listservs.

The IOG's history of networking in the state reaches back to 1931. From then to the early 1990s, the IOG used basically four networking technologies: roads to drive to locations to teach, telephones and mail for advising, and publications. In 1994 the IOG added e-mail and in 1995 a Web site, NCINFO. Although e-mail and the Web site both expanded the bundle of networking tools, each had certain limitations in terms of reaching an ideal of networking communication—dynamic, immediate connections among a large group of peers and experts.[1]

E-mail works similarly to telephone calls: it is best one-on-one and moderately good with a small group. But when you want to reach hundreds of people and allow all of them to interact, e-mail quickly shows its shortcomings.

A Web site can overcome some of the problems of sharing information with a large group. Hundreds, thousands, and even hundreds of thousands of people can obtain the same information from the same location. Such is the magnitude of the Internet; it is a world bulletin board to which people have access twenty-four hours a day, seven days a week. However, dynamic interchange does not occur with "static" Web pages—pages containing fixed information. Someone with a specific question is much more likely to make a telephone call or send an e-mail than to search a Web site for an answer, especially if he or she needs the answer quickly. Enter listservs.

What the Listserv Is—A Killer Application for Networking

"Killer application" is jargon in the computer industry for "an application program that intentionally or unintentionally gets you to make the decision to buy the system the application runs on."[2] More loosely defined, a killer application is something a computer user cannot live without. A listserv is a killer application because it subsumes multiple e-mail addresses under a single one, thus allowing all the listserv members to share an address. To accomplish the same feat using an e-mail application alone (say, Microsoft's Outlook or Netscape's Messenger), each member would have to create a "group" (a list of e-mail addresses that the member wants to be related under a single heading) in his or her own e-mail application. If someone left the group, everyone would have to update his or her list. The listserv solves this problem by centralizing the list of members in a single database and attaching that list to a single e-mail address—for example, humanresources@listserv.unc.edu or ncpublicworks@listserv.unc.edu. Each member simply sends a new e-mail message to the single address, and the message goes to every member of the list. When a new member joins or an old member leaves, the change is made to the central database, and users just keep sending messages to the single address without worrying about making changes to a group in their own e-mail address book.

One of the IOG's largest and most active listservs, ncplan, contained 593 members on February 11, 2002. Imagine creating that list in your own e-mail application, getting the other 592

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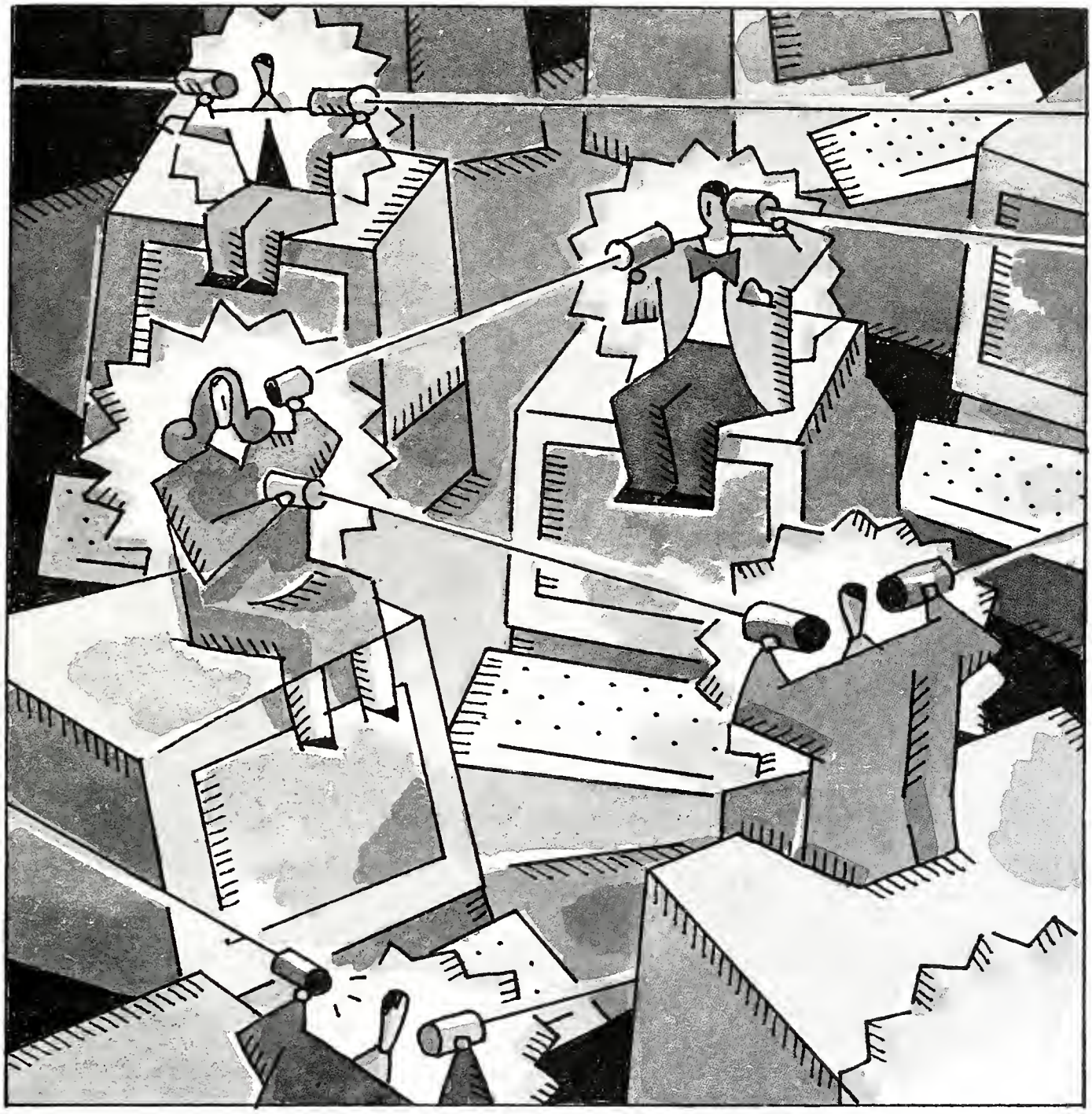


I am on several listservs as I wear many hats in a small organization (finance, purchasing, human resources, instructional technology, and geographic information systems). Being a "jack of all trades and master of none" confronted with limited time and unlimited responsibilities, [I find that] the listserv helps me keep up with what's going on in the state and feel more comfortable that I am directing operations in compliance with applicable laws and best practices.

—Martha Ziegler, director of administration and finance, Asheville (member of the nclgba listserv, among others)

members to create the same list in their e-mail applications, and all of you keeping the list updated—not an easy solution for sharing accurate and reliable information quickly.

Local governments in North Carolina have a great need for this kind of knowledge sharing. Small as well as large administrative units are responsible for all the areas in which government performs. Administrators working in each of those areas, and in many cases across several areas, form a peer group

IOG Listservs

Name	Client Group	List Administrator	Administrator's E-mail Address
buslic	Business licensing	Philip Young	young@iogmail.iog.unc.edu
ccmanagers	City/county managers	William Rivenbark	rivenbark@iogmail.iog.unc.edu
clerks	City/county clerks	Fleming Bell	bell@iogmail.iog.unc.edu
dssattorneylist	Department of Social Services attorneys	Janet Mason	mason@iogmail.iog.unc.edu
fodg	Facilitation and organization development	John Stephens	stephens@iogmail.iog.unc.edu
humanresources	Human resources administrators	Diane Juffras	juffras@iogmail.iog.unc.edu
instofgovpubs	Publication buyers	Katrina Hunt	huntk@iogmail.iog.unc.edu
iogcriminal	Criminal lawyers	Robert Farb	farb@iogmail.iog.unc.edu
lglaw	Local government lawyers	Fleming Bell	bell@iogmail.iog.unc.edu
ncard	Registrars of deeds	William Campbell	campbell@iogmail.iog.unc.edu
ncfinance	Finance officers	Gregory Allison	allison@iogmail.iog.unc.edu
ncgis	Geographic Information System administrators	Philip Young	young@iogmail.iog.unc.edu
nclgba	Budget association members	Maureen Berner	berner@iogmail.iog.unc.edu
nclgisa	Instructional technology administrators	Philip Young	young@iogmail.iog.unc.edu
ncplan	Planners	David Owens	owens@iogmail.iog.unc.edu
ncpma	Property mappers	William Campbell	campbell@iogmail.iog.unc.edu
ncpublicworks	Public works administrators	Richard Whisnant	whisnant@iogmail.iog.unc.edu
ncpurchasing	Purchasing agents	Frayda Bluestein	bluestein@iogmail.iog.unc.edu
ptax	Tax administrators	Joseph Hunt	huntj@iogmail.iog.unc.edu
soilconservation	Soil and water conservation specialists	Richard Whisnant	whisnant@iogmail.iog.unc.edu
waste	Waste managers	Richard Whisnant	whisnant@iogmail.iog.unc.edu

that can network through conferences, associations, telephones, letters, and e-mail.

Taking all the forms of networking mentioned earlier, a person can "kluge" an impressive, if sometimes inconsistent, networking system. (Coined in 1962 as a noun, "kluge" means "a system and especially a computer system made up of poorly matched components.")[3] Add a listserv to an area of specialization, attach all the e-mails of the peer group, and include some outside experts, and local government officials have a consistent, reliable, and comprehensive networking system that is free and easy to use. Instead of one person taking repeated telephone calls from different people about the same issue, informing only those who call, an e-mail to a listserv shares the question and the answer with all the members, *and* creates an electronic file of the exchange that can be recalled from an archive of the messages.

Besides connecting a group of e-mail users under a single e-mail address, a listserv works well with what is currently the most comprehensive electronic foundation in the state—the telephone system. A listserv can run efficiently and effectively across existing telephone lines, which reach into almost every home and business in North Carolina. So every local government can participate with minimum cost and maximum benefits. Even local governments that are not currently online will likely find joining surprisingly easy and not particularly costly, especially considering the benefits.

The IOG currently maintains twenty-one public listservs for government officials (see the sidebar, opposite).

What a Local Government Needs to Join a Listserv

To join a listserv, a local government needs an office with a telephone jack and a power outlet. Building from that simple foundation, the government will have to purchase a computer with a modem, a standard feature on almost all computers. (A computer with a modem, a monitor, and speakers now can be purchased for as little as $600.)

Most computers purchased through a major distributor (such as Compaq, Dell, or Gateway) or a major retailer (such as Best Buy, Circuit City, or Walmart) will come with a subscription to an Internet service provider (ISP), usually Microsoft Network (MSN) or America Online (AOL). On-screen instructions will take you through the procedures for setting up Internet and e-mail accounts. If an ISP subscription does not come with your computer, your next step is to contact an ISP, which might be a local phone company or a national provider (such as Mindspring or Earthlink) or the State of North Carolina Information Technology Services at (800) 722-3946. Most basic Internet service rates are about $20 per month.

Once you have set up an Internet and e-mail service, you can direct the computer to connect to the Internet by having the modem dial the number for the provider and establish a link. Then you have access to the Internet, and you can begin to send e-mail to and receive it from IOG listservs.

How the IOG Listservs Work

The University of North Carolina at Chapel Hill manages the listserv application. Members can receive their messages through e-mail or view their messages through a Web browser (Internet Explorer, Netscape Navigator, or Opera). Membership in a listserv generally is restricted to local or state officials working in the area of specialization covered by the listserv, and to the IOG faculty member who administers the list.

There are several ways to join a listserv. The fastest way is to go to a listserv entry page on the Web (for example, http://www.cpt.unc.edu/technicalassistance/appmanagement/listservscreenshot1.htm; see below) and follow the instructions there. After you have entered your membership information, your request to join will be logged in and sent to the list administrator. If you do not have a clearly designated city, county, or state e-mail address (name/title@ci.cityname.nc.us, name/title@co.countyname.nc.us, or name/title@ncmail.net), you may be contacted via e-mail by the list administrator or the NCINFO director at the IOG (who administers all the lists) to verify your position.

A second way to join a listserv is to call the NCINFO director at (919) 962-0592 and request to be put on a listserv. A third way is to send a request by e-mail to young@iogmail.iog.unc.edu.

I am constantly being asked to gather data or poll the assessors and collectors regarding legislative issues. Our ptax listserv [the listserv for tax administrators] has proven to be the very best tool available to reach my colleagues in one quick and massive stroke. Ptax has enabled us to respond to legislative issues in a very efficient and effective manner.

—W. A. (Pete) Rodda, tax assessor/collector, Forsyth County (member of the ptax listserv)

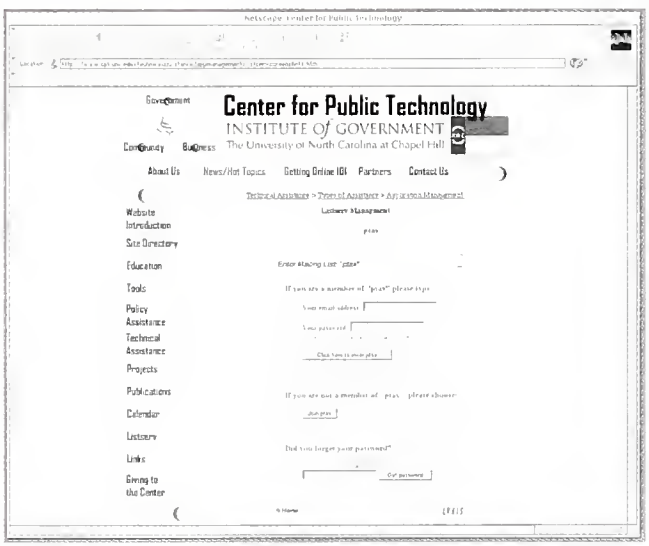
What to Expect after Joining

The listservs connect a large number of peers, so e-mail traffic may at first seem heavy to new members. A member's amount of e-mail may rapidly expand if he or she is a clerk or a manager in a small municipality who participates in several listservs to accommodate the many hats he or she wears. A single active listserv like ncpurchasing or humanresources can produce 5–20 messages daily. A clerk or a manager trying to follow conversations on multiple listservs might face 25–100 messages a day. Fortunately, most e-mail applications have methods for automatically routing and managing incoming mail. The listserv application offers several ways to receive or retrieve messages. They are discussed next.

E-Mail Management through a Web Browser

Once a member joins a listserv, the default setting for message delivery is to receive e-mail as it is posted to the listserv. So each time a message is sent to the listserv address, that message goes out to the membership.

A member who accesses the listserv through a Web browser (Internet Explorer, Netscape Navigator, or Opera) will find an option called Your Settings that will allow him or her to change the



IOG's Web site includes instructions for joining each listserv. For example, the screen shot here tells users how to join the ptax listserv.

delivery method, or Status, to one of the following:

- Index—one daily message with only the subject lines for that day (recommended)
- Digest—one daily message with all the contributions for the day (not recommended)
- Mimedigest—one daily message with all the contributions for that day in MIME format (not recommended)
- Nomail—no mail to be received from this mailing list (not recommended)

Among the Web browser options, Index is recommended because it mixes the "pushing" advantage of a listserv with the "pulling" feature of a Web browser. That is, it sends the member a single message daily but requires the member to go through a Web browser to read the contributions. Compared with management through an e-mail application (see the next section), though, this option adds a layer of work to the responsibility of the user, which may deter him or her from getting the most out of the service.

The Digest method is not recommended because the messages are not sent in plain-text formats. Instead, they come with codes used to make messages look "pretty" (special fonts, colors, backgrounds, etc.). The digest messages therefore can be difficult to decipher. Mimedigest messages also cause problems for e-mail applications because they often contain text and code not related to the content of the messages. The Nomail option is not recommended because a member may forget about the listserv and miss important discussions.

Viewing listserv messages through a Web browser has advantages and disadvantages. On the positive side, it allows you to get to messages anywhere you can get online with a computer. If you are away from the office for a few days or are on vacation and cannot let go of work, you can go online and read the listserv messages.

However, you cannot download listserv attachments through a Web browser. If you choose to use the Index option and a member of the listserv sends an attachment (a form or a policy document, for example), you will have to e-mail that member directly and ask him or her to send the attachment to you. Of course, viewing messages exclusively online helps prevent viruses from entering your computer through attachments.

E-Mail Management through an E-Mail Application

The best solution is to receive e-mail as it is contributed to the listserv, but to set up folders for it, then apply rules (in Microsoft Outlook) or filters (in Netscape Messenger) to route it to designated folders as it is delivered. Using a rule or a filter allows you automatically to divert incoming mail from the inbox (the main mailbox) and have it waiting in a folder for review at certain times of the day or week. Deleting unnecessary or unread mail becomes easier because all the mail is organized in folders. Also, messages that contain important information can be kept for future reference.

Many times I am able to look back at saved responses to earlier questions and avoid contacting my counterparts in other organizations to ask for info on how they pay, administer benefits, discipline employees, etc. My only problem is . . . how to sift through all the info that my peers put out there!

—Judith Carton, human resources director, Burke County (member of the humanresources listserv)

Unfortunately the instructions for setting a rule or a filter are not the same, even from version to version of the same software. So, for example, if you are using Microsoft Outlook, the instructions may be different between Outlook Express 98 and Outlook 98, and even between the latter and Outlook 2000. When you seek help with any software application, it is important that you know which version of the application you are using, because you probably will be asked.

Since the process for setting up rules or filters can be tricky, feel free to contact the NCINFO director at (919) 962-0592 to get started. If the NCINFO director cannot help you or you cannot get in touch with anyone in a timely fashion, the next-best solution is to get technical help from Microsoft's customer service at (800) 936-5700 (for a fee of $35 per request) or Netscape's customer service at (800) 411-0707 (for "low cost assistance"). If you currently have online access, you can see a sample of Netscape Messenger's filtering process for Netscape Messenger 4.7 on the Center for Public Technology's page about e-mail management at www.cpt.unc.edu/technicalassistance/appmanagement/email.html.

How to Avoid Viruses

An important concern in joining a listserv is that an increase in e-mail traffic leads to greater chances of getting a virus sent to your computer. No one should be using a computer without virus protection software installed, running, and regularly updated. The IOG has a policy of addressing virus-infected messages as quickly as possible. The NCINFO director monitors all listservs for virus problems. As soon as one is detected, the offending account is removed from the listserv, and the member is notified that his or her account has been suspended until the infected machine has been cleaned. Once the machine has been cleaned and the member confirms that the proper action has been taken, he or she is allowed back on the list.

Members can help police the listservs. The first person to spot or receive a virus message can contact the NCINFO director immediately and, if possible, contact the member whose account sent the virus. (Most virus messages are sent automatically by a virus program that taps into the address book of the infected machine and sends itself out to every member of the address book without the owner's knowledge. So be nice when you call; don't accuse the member of personally sending you a virus.)

Another concern of listserv subscribers is whether the IOG can shield them from viruses sent by other members. Unfortunately, although computer users can easily install and use virus protection software, making virus protection a part of the listserv system itself is more

difficult. The university has resisted efforts to install filters for electronic messages, including those that may contain viruses, for two reasons. First, the university considers itself a common carrier, like a telephone company, and common carriers typically do not filter the information that they carry. Second, adding virus protection to the listserv software would be very costly. Until the NCINFO director finds a way to resolve these two problems, it is easier for listserv users to take responsibility for obtaining virus protection on their own computers.

How to Use a Listserv

Once you join a listserv and your account becomes active, you will begin receiving messages. To send a new message to the listserv, you need only address a new e-mail message to the listserv using the following convention: listserv name@listserv.unc.edu (so, for example, humanresources@listserv.unc.edu or clerks@listserv.unc.edu).

Because the listservs generate so much traffic, it is important to know and try to follow some listserv "netiquette" (proper or good behavior in sending and replying to e-mail).

- ***Write meaningful subject lines when posting a message.*** If you have a question, say, about Web use policy for employees, don't just write "question" in the subject line. Instead, write "I have a question about Web use policy for employees" or simply "Web use policy for employees." Vague or ambiguous subject lines force members to open the e-mail to see if it has any relevance for them. Fellow members will become quickly frustrated if they open an e-mail only to discover that the question is not of interest to them. Meaningful subject lines allow members to scan messages and skip over ones that do not interest them without worrying that they are missing important information.
- ***Remember that, by default, your reply will go to all the members of the listserv.*** The listserv promotes public discussion. In most but not all cases, answers should be shared. When only the sender should receive your reply, you should open a new e-mail message, insert the intended member's e-mail address, and send the new message to the intended member. If you try to shortcut the reply by clicking on and selecting the individual e-mail address from the original message (and thus not starting a new e-mail), the default control can and will likely override the single-address reply and send the message to everyone on the listserv.
- ***Avoid sending simple replies to all the members of the listserv.*** If a member has answered a question sufficiently, resist sending replies to the listserv that say, "Ditto," "Yes," "Us too," and the like. Instead, send these simple replies directly to the sender. The sender may want them to get a sense of how many members solved the problem or answered the question the same way, but all the listserv members do not need this information. If they want to know how many people agreed, they can e-mail the original sender.
- ***If you are a new member, do not request a reply to your first (possibly test) message.*** Another default setting for new accounts is that members receive copies of their messages after they have sent them. If you are a new member sending a test message, you will receive a copy of your e-mail. If you do not, contact the NCINFO director at (919) 962-0592. If you are a veteran member, resist the urge to reply to test messages. Such replies create unnecessary e-mail.

Toward a Networking Ideal: Expanded Listservs

The IOG hopes to continue to expand the number of listservs and the membership of the current listservs. Its vision is a listserv for each area of specialization, with a faculty member to support the listserv and with every local and state employee who works in that area of specialization on the list.

How realistic is this vision? Considering that e-mail works effectively with the existing telephone infrastructure, having every local government official possess an e-mail address is quite feasible. The number of members that should be on any list can be determined by the structure of state and local government in North Carolina. For example, a complete clerks listserv (for county clerks, city clerks, etc.) would have 100 clerks from the counties and 700-plus from the municipalities (assuming that all have clerks or a person who performs the duties of clerk). As of February 11, 2002, the clerks listserv had 273 members. So the IOG has a way to go.

Another goal is to maintain the integrity of the listservs in providing accurate and reliable information supported and sustained by knowledgeable peers and IOG faculty members. Ideally, there would be a faculty member for each area of specialization. In reality, the IOG creates only listservs that it can support with a faculty member. Unfortunately the IOG has had to turn down requests for listservs for lack of a faculty sponsor. If you are a member of a local government area that uses the IOG and one of its faculty members for support and there is not a listserv for your group, contact the faculty member to discuss whether creation of a listserv for your group makes sense.

An easily attainable goal is to maximize the number of people who participate in each listserv. If you are a member of one of the groups already served and you do not currently subscribe, consider joining. You may contact the NCINFO director for help. No other current networking option or technology will allow you to achieve the shared knowledge and dynamic interchange that the listservs provide. With proper management tools, proper security tools and knowledge, and peer effort to use listserv netiquette, everyone can participate in community discussion and problem solving.

Notes

1. As used in networking communications, "dynamic" describes active solicitation of information that results in immediate replies: at least on the same work day, at best within a few minutes or hours.

2. From Whatis.com, available at http://searchSolaris.techtarget.com/sDefinition/0,,sid12_gci212442,00.html.

3. *Merriam-Webster Dictionary*, available at www.m-w.com/cgi-bin/dictionary.

FROM THE MPA PROGRAM

Wake County's Negotiated Agreement on School Funding: Has It Worked?

Erin S. Norfleet

In 1997, to resolve a dispute over local school funding, the Wake County Board of Education and Board of County Commissioners negotiated an agreement launching a five-year schedule of county allocations to the school system's fund for current expenses. The multiyear agreement, which was based on a "school tax rate" funding formula, was the first of its kind in North Carolina. The agreement having terminated in September 2002, this article evaluates its effectiveness. The analysis relies on several sources of evidence, including sixteen interviews with school and county board representatives, and the application of dispute resolution standards drawn from a review of the literature.

Throughout the state the conflict innate to North Carolina's school funding structure continues to strain relations within local government. Understanding whether the Wake County agreement has been effective is important for all North Carolina counties considering similar measures.

School Financing in North Carolina

In North Carolina, state and local governments share legal responsibility for the public education system. The School Budget and Fiscal Control Act, codified at Section 115C-422 through -452 of the North Carolina General Statutes (hereinafter G.S.), assigns primary responsibility to the General Assembly and the State Board of Education, which fund the system's current expenses (for example, instructional programs, support services, and salaries and benefits for teachers and other school employees). Locally, county commissioners augment state funding with appropriations for construction and maintenance of school facilities. Also, the state constitution authorizes local governments to supplement their basic education program with operating appropriations approved by local boards of county commissioners.[1] On average, the state pays for 65 percent of total school costs, including current expenses, capital outlays, and debt service payments, while localities supply 25 percent and federal funds account for 10 percent.[2]

ROBERT WILLETT/NEWS & OBSERVER

Rapid growth over the past decade has led to steady increases in [Wake County's public school] enrollment, which now totals more than 100,000 students.

North Carolina's system of financing public schools is unusual in three respects.[3] First, state income and sales taxes rather than local ad valorem property taxes (taxes based on the value of land and buildings) constitute the primary source of revenue for schools. Second, state allocations depend on a school system's enrollment and general operating costs, not a local government's ability to pay. Third, boards of county commissioners, not local school boards, possess tax-levying and borrowing authority. Although the school board submits an annual budget to the board of county commissioners, the county board has final authority to determine local appropriations.[4]

Inherent in this framework for local school funding is the potential for dispute. The local school board establishes educational policies and has an interest in funding schools at a level that achieves educational goals. The county board, though sympathetic to high-quality education, faces other funding needs and has an interest in keeping tax rates at a reasonable level.

Dispute Resolution

Under North Carolina law, school boards have the right to challenge funding decisions made by boards of county commissioners. The procedure for addressing such funding disputes was created nearly a century ago and has evolved into G.S. 115C-431.[5] The intent of G.S. 115C-431 is to facilitate a prompt resolution of conflicts between the two kinds of boards.[6]

The process is initiated when a school board determines that a board of county commissioners' appropriation for the school system's current expense fund, or its capital outlay fund, or both, is "not sufficient to support a system of free public schools."[7] If a school board challenges an appropriation, the two boards must meet publicly with a

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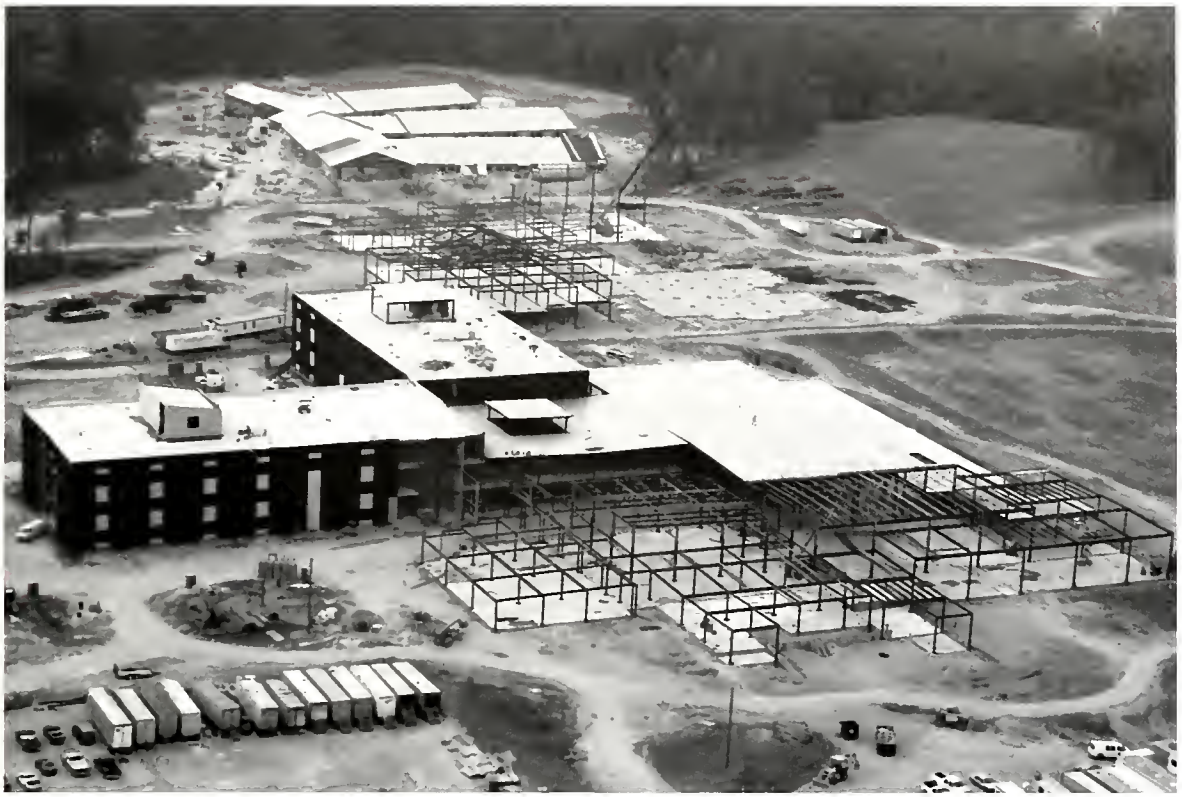

One of the new schools under construction in Wake County

CHRIS SEWARD / NEWS & OBSERVER

mediator within seven days of the appropriation to attempt a resolution.[8] If differences remain after the boards meet, either board may request private mediation to resolve the issue by August 1.[9] During private mediation sessions, working groups consisting of the boards' chairs, attorneys, and finance officers, the county manager, and the superintendent represent board members.[10]

Wake County—1997

The Wake County Public School System currently operates 78 elementary, 24 middle, and 15 high schools as well as 6 special/optional schools, making it the second-largest school system in North Carolina and the thirtieth-largest in the United States.[11] Rapid growth over the past decade has led to steady increases in [Wake County's public school] enrollment, which now totals more than 100,000 students.[12]

This growth was at the heart of the funding dispute that ultimately invoked the resolution procedures of G.S. 115C-431 for the first time in Wake County. School board members argued that county funding had increased at a rate lower than inflation for five years[13] and that per pupil expenditures had declined in the previous two years,[14] whereas enrollment had increased by nearly 9,000.[15] As a result, the superintendent and school board members proposed a $485.9 million spending plan, including $129.8 million from the county.[16] This proposal would have increased the county's allocation by nearly 20 percent[17] and required a tax increase.[18]

The county board responded by raising its public school funding but only to $116.8 million.[19] This level of support did not necessitate a tax increase, which was a major concern of some commissioners. A majority of commissioners argued that the 7.7 percent increase was the largest one in current expense funding in seven years[20] and greater than the county's overall budget increase of 6 percent.[21] Moreover, of the $25 million increase in the county's total budget, 72 percent, or $18 million, was appropriated for the Wake County Public School System.[22]

Unsatisfied with the appropriation, the school board initiated mediation procedures. Following an inconclusive public meeting with a mediator, working groups for each board engaged in private mediation to reach a tentative agreement.[23] On July 28, 1997, both boards voted unanimously to adopt a Joint Resolution and Settlement Agreement.

The agreement was designed to resolve the fiscal year (FY) 1998 dispute and to establish a formula for county funding of the school system's current expenses in subsequent years.[24] Under the provisions of the agreement, in FY 1998, an additional $1.1 million would be added to the $116.8 million already appropriated.[25] Also, beginning in FY 1999, the county allocation for operating expenses would be based on a "school tax rate" equal to $.35 per $100 value of the county's ad valorem property tax base, or $130 million, whichever was greater.[26] Further, school board members could request an increase in the school tax rate, which would stand unless two-thirds of the commissioners opposed it.[27] Finally, the funding plan would remain in place for at least five years, and both boards would review its use no later than September 2002.[28]

Research and Evaluation Design

One measure of an effective agreement is whether it meets the goals of its developers.[29] If it fails to do so, the failure may rest with either poor design

Table 1. Evidence of the Wake County Agreement's Strength

Characteristic	Agreement Exhibits Characteristic (Yes/No)	Evidence
Anticipatory	**Yes**	Five-year plan for county appropriations to current expense fund, based on county growth
		Provision for school board to request increases
		Provision for upcoming bond referendum
		Budgetary procedures to be followed by both boards and their staffs (budget projections, distribution of funds, adjustments due to property revaluations)
Substantive	**Yes**	Addition in 1997–98 of $1.1 million to $116.8 million previously appropriated
		Requirement that school board not file lawsuit against county board regarding 1997–98 appropriation to current expense or capital outlay fund
		Funding formula for 1998–99 through 2002–03 based on school tax rate of $.35 per $100 property valuation
		Budgetary procedures to be followed by both boards and their staffs
Comprehensive	**Yes**	Appropriation for 1997–98 increased to $117.9 million without tax rate increase
		School board funding aligned with county growth for 1998–99 through 2002–03
		Provision for upcoming bond referendum
Final	**Yes**	No further negotiation or interpretation of agreement needed for implementation
Nonconditional	**Yes**	No conditional performance required of either board or its staff in 1997–98
Binding	**Legally, no; politically, yes**[1]	Formal and unanimous adoption by both boards
		Adherence to agreement despite turnover in boards' memberships

1. Given the nature of the annual budget process, the agreement does not *legally* bind the boards to certain actions. Interview data suggest, though, that the agreement has been *politically* binding.

or poor implementation. Consequently this analysis addresses three questions:

- ***Strength of the agreement:*** Does the Wake County agreement exhibit the characteristics of a strong agreement?
- ***Implementation:*** Have the involved parties implemented the process established by the agreement?
- ***Goals:*** Have the goals of the agreement been reached?

Strength of the agreement. The stronger an agreement is, the more likely the parties' interests will be met and their goals accomplished.[30] Although variations exist, experts generally agree that a strong agreement exhibits six characteristics.[31] It should be

1. anticipatory, foreseeing developments that could strain it;
2. substantive, defining specific, tangible activities and exchanges (quid pro quos);
3. comprehensive, including a resolution of all disputed issues;
4. final, including details in their final form;
5. nonconditional, providing for the termination of the dispute without the requirement of future conditional performance; and
6. binding, formally obligating the parties to certain actions.

The text of the agreement served as the primary data source for evaluating the agreement's strength. Media accounts and interview data supplemented the analysis.

Implementation. Implementation of the agreement is equally important for it to be effective. The Wake County agreement mandates that each board follow specific procedures in the initial year to settle the budget dispute and in subsequent years to prevent future conflict. A year-by-year analysis of the agreement's thirteen provisions was conducted to determine if, and to what extent, they were implemented. The analysis drew on budget documentation and interviews with the budget staff of both boards. Budget documentation indicated the amount appropriated each year and any requests for tax rate increases. Budget staff confirmed if budgetary procedures pertaining to revenue projections, disbursements, and adjustments were followed.

Goals. The agreement's goals were not documented in 1997. Consequently an interview instrument was designed to determine what the original goals of the agreement were, what their relative importance was, if and how the goals were achieved, and if the agreement had unanticipated effects. The instrument included ten questions related to the interviewees' involvement with either the development of the agreement or the implementation of the agreement's provisions. Sixteen interviews were conducted between November and March 2002: 5 with county commissioners,

Table 2. **Relative Importance of Goals**

Goal	Average Overall Weight (%)	School Board Average (%)	County Board Average (%)
1. Avoid litigation	8.85	8.57	9.07
2. Prevent future disputes	16.98	16.43	17.41
3. Improve relationships between boards	16.67	15.71	17.41
4. Align public accountability	20.94	6.43	32.22
5. Establish predictable funding schedule	35.94	51.43	23.89

Interviewees weighed the relative importance of the goals by assigning points to each, so that the total points for all five goals added to 100.

3 with school board members, 3 with county board staff, 3 with school board staff, and 2 with the attorneys of both boards.[32] Five goals emerged (discussed later).[33] Interviewees each indicated the relative importance of the goals by dividing 100 points among them.

Findings and Discussion

Judged by the six characteristics described earlier, the Wake County agreement is strong. It exhibits at least five of them (see Table 1).

Results of the year-by-year analysis demonstrate that the agreement also has been well implemented. Both boards have adhered to the agreement's thirteen provisions. For example, consistent with the second provision, in three of the five years, the school board requested increases in the school tax rate. The county board approved the request in two of those years and denied it in one (presumably by a two-thirds vote of the commissioners). Further, consistent with the third provision, the county board annually provided the school board with "an estimated revenue projection based on the anticipated collections for the following fiscal year."[34]

Representatives of the two boards overwhelmingly concurred that the agreement effectively resolved the boards' initial conflict—over local funding for FY 1998. Interviewees noted that both boards unanimously adopted the agreement, citing that the final $117.9 million appropriation for FY 1998 gave members of both boards what they wanted. The compromise responded to the increased enrollment that had resulted from the county's growth, without requiring a tax increase.

Despite this initial success, however, there has been limited achievement of the agreement's goals. As noted earlier, an instrument designed to identify the goals of the agreement found five:

1. To avoid litigation
2. To prevent future disputes
3. To improve relationships between the boards
4. To "align public accountability" (that is, to make the school board accountable to the public for tax rate increases)
5. To establish a predictable funding schedule for the school system's current expenses

The first one, avoiding litigation, is rooted in G.S. 115C-431, which requires mediation to resolve disputes, and 94 percent of the interviewees confirmed it was a goal of the agreement. The second and third goals—preventing future disputes and improving the relationship between the two boards—are typical goals of many dispute resolution procedures, and 94 percent of the interviewees agreed they also were goals of the Wake County agreement. The fourth goal, aligning public accountability for tax rate increases with school board members, was reported by 81 percent of the interviewees, and the fifth goal, establishing a predictable funding schedule for the school system's current expenses, was cited by 88 percent.

Notably the two boards prioritized some goals differently (see Table 2). For example, the most important overall goal was to create a predictable system for local funding of current expenses. However, whereas school board representatives considered this goal to be the most important one, county board representatives considered it less significant than holding the school board publicly accountable for tax rate increases. Similarly, although the goal of making the school board accountable was second in overall importance and most important to county board representatives, it was least important to school board representatives (nearly 60 percent assigned zero weight to it). In spite of these differences, representatives of the two boards agreed that preventing future disputes and improving relationships stood in third and fourth place, respectively. Finally, although avoiding litigation was cited as a goal by 94 percent of the interviewees, representatives of both boards scored it low in importance.

Thus, although the Wake County agreement has proved successful in accomplishing some of its goals, it has failed to achieve the goals considered most important to some key stakeholders.

- All the interviewees confirmed that neither board had taken legal action over issues pertaining to school funding since the agreement was put into place, verifying that the agreement's goal of avoiding litigation was met.
- However, only 56 percent of the interviewees believed that the goal of preventing disputes was achieved as a result of the agreement. Recent history supports this. Disputes erupted in FY 2001 and FY 2002 when the school board requested increases in the school tax rate.
- An anticipated outcome of the agreement was an improved relationship between the two boards. Seventy-five percent of the interviewees agreed that relationships improved both informally and formally. However, of those, 70 percent reported that improvements occurred only initially; relationships returned to their earlier,

more volatile state following turnover on both boards.
- Although county board representatives intended the agreement in part to make the school board publicly accountable for funding, none of the interviewees believed that this goal was achieved. They overwhelmingly agreed that the public still holds the board of county commissioners accountable for increases in the property tax rate.
- Even though conflicts continued to occur, all the interviewees confirmed that the agreement achieved its goal of establishing a multiyear system of predictable county funding of the school board's current expenses. Nonetheless, every school board member interviewed also reported that the current system was insufficient and failed to capture inflation and growth in the schools accurately.

Recommendations for Wake County and Others

Wake County's experience offers several insights into development of an agreement for resolving local budget disputes. These are drawn from the results just reported and from interviews with a staff member of the North Carolina School Board Association and three school board attorneys who have helped craft agreements in five other North Carolina counties.[35]

1. Turnover among board members interferes with preventing conflicts and improving relationships between the two boards. Turnover was the most frequently cited reason for the Wake County agreement's not preventing disputes or improving relationships between the two boards in the long term. Newly elected board members were reportedly less knowledgeable about and committed to the provisions of the agreement than members involved in its development.

2. Shifting public accountability for tax rate increases to school boards is not a likely outcome. Considering the local school finance structure in North Carolina, shifting public accountability for raising taxes to school boards appears unrealistic. It was widely agreed that the Wake County agreement failed in this respect, despite the creation of a school tax rate tied to the county's property tax base. Two Wake County representatives believe that greater communication with the public on this issue is needed.[36] Other people believe that the only way to establish clear lines of authority and accountability is to change state law to grant school boards tax-levying power.[37]

3. Goal-setting should be a shared and documented process. The interviewees consistently agreed that members of both boards were in accord on their interpretation of the agreement. Yet, as the analysis demonstrates, the boards diverged on the agreement's goals and the priorities among them. This highlights the reality that goals often differ among key stakeholders to agreements. It also suggests that express communication about these differences is not common. Finally, evaluating goal achievement is problematic when goals are not documented up front. For these reasons, disputing parties should discuss and document their goals and anticipated outcomes as they craft an agreement.

4. Parties to a dispute should consider various funding-formula options. In tying Wake County's appropriation directly to growth in the property tax base by way of a school tax rate, members of both boards attempted to accommodate increases in school enrollment. Yet a common argument among school board representatives was that the county's rates of growth and inflation did not mirror those experienced by the school system.[38] Instead, some suggested a "school growth factor" that accurately captures school growth and inflation.[39] Although this analysis does not propose a funding solution, it suggests that parties should consider various options.

5. Parties to a dispute should consider a multiyear agreement. Although the Wake County agreement did not achieve all its goals, unanticipated effects reportedly occurred as a result of its implementation. Members of both boards stated that by establishing a minimum funding level, the agreement provided an opportunity for increased discussion about other issues and more time for getting work done.[40] Similarly, budget staffs reported that the existence of a predictable funding level allowed for timely planning.[41]

Conclusion

Wake County's response to the political conflict inherent in North Carolina's local school finance structure offers an example of a strong agreement that at least had the potential to be implemented successfully. Although the agreement has not achieved all its goals, its establishment of a predictable funding schedule based on a school tax rate formula offered some benefits. Ultimately any agreement—even a strong one like Wake County's—will encounter difficulties because of the conflict inherent in a system with divided responsibilities for school funding.

Notes

1. Laurie L. Mesibov, *Elementary and Secondary Education*, in COUNTY GOVERNMENT IN NORTH CAROLINA 811, 829 (4th ed., A. Fleming Bell, II, & Warren Jake Wicker eds., Chapel Hill, N.C.: Institute of Gov't, The Univ. of N.C. at Chapel Hill, 1999).

2. *Id.* at 831.

3. Only Maryland, South Carolina, Tennessee, and Virginia have comparable funding systems. Telephone Interview with Leanne Winner, Director of Governmental Relations, North Carolina Sch. Bd. Ass'n (Jan. 9, 2002).

4. Mesibov, *Elementary and Secondary Education*, at 831.

5. C. Thomas Powell, *Development of the Law*, SCHOOL LAW BULLETIN, Spring 1998, at 20.

6. Under the School Budget and Fiscal Control Act, the local superintendent must present a proposed budget to the school board by May 1. After reviewing it, the school board must present the budget to the board of county commissioners no later than May 15. The commissioners must then adopt a final budget for the county, including the county appropriation for the school system, by July 1. G.S. 115C-422 through -452.

7. G.S. 115C-431.

8. The mediator may be selected by agreement of the two boards or by appointment by the senior resident superior court judge. G.S. 115C-431.

9. The process may extend beyond August 1 if both boards agree. Otherwise, if a resolution is not reached by August 1, the county commissioners must appropriate and begin payment of an amount equal to the previous year's appropriation to the schools. The board of education may ultimately take the matter to court, where a judge or a jury will determine the amount of money necessary to maintain a system of free public

schools and the amount of money needed from the county, if any, to make up this total. G.S. 115C-431.

10. The chairs of each board, the county manager, and the superintendent may designate representatives instead. G.S. 115C-431.

11. WAKE COUNTY GOV'T, WAKE COUNTY FY 2001–2002 ADOPTED BUDGET, available at www.co.wake.nc.us/budget (last visited Dec. 12, 2001).

12. *Id.*

13. Todd Silberman, *Private Talks Set on Schools' Budget*, NEWS & OBSERVER, July 9, 1997, at 1B.

14. Wake County's per pupil expenditures ranked fourteenth among North Carolina's districts in 1997. *Id.*

15. Todd Silberman, *Sides Told to Meet on School Funding*, NEWS & OBSERVER, June 28, 1997, at 1A.

16. E-mail from Terri Kimzey, Budget Director, Wake County Pub. Sch. System, FY98 BOE Budget Request (Mar. 26, 2002).

17. *Id.*

18. The FY 1997 county appropriation totaled $108.5 million. WAKE COUNTY PUB. SCH. SYS., BOARD OF EDUCATION 2001–02 PROPOSED BUDGET, available at www.wcpss.net/budget/2001-02-budget-request (last visited Mar. 25, 2002). School board members believed that the public would support a tax increase since voters had approved a school construction bond issue the previous year by 79 percent. John B. Stephens & Matthew J. Michel, *Mediate, Don't Litigate*, SCHOOL LAW BULLETIN, Spring 1998, at 29.

19. The $13 million difference between the two boards included funding for expenditures such as increased teacher salaries, additional teachers for low-income and English-as-a-second-language students, and technical support staff for the system's computer networks. Todd Silberman, *School Board Talking Taxes*, NEWS & OBSERVER, May 6, 1997, at 1B.

20. Lynn Bonner, *Wake Ok[ay]s Budget, Holds Line on Taxes*, NEWS & OBSERVER, June 17, 1997, at 1A.

21. The proposed $428.4 million county budget represented a 6.2 percent increase over the $403.4 million in the FY 1997 budget. Lynn Bonner, *Big Hike in School Spending Pushed*, NEWS & OBSERVER, June 3, 1997, at 1A.

22. Lynn Bonner, *Budget Debate Will Focus on Schools*, NEWS & OBSERVER, May 20, 1997, at 1B.

23. John McMillan, a Raleigh attorney with experience as a lobbyist at the General Assembly, served as mediator. Stephens & Michel, *Mediate*, at 35. The school board's working group members included then board chair Roxie Cash, then superintendent Jim Surratt, then associate superintendent James Merrill, school board attorney Ann Majestic, and senior budget director Terri Kimzey. The county board's working group members were then board chair Stewart Adcock, then county manager Richard Stevens, then deputy county manager David Cooke, county attorney Michael Ferrell, and budget director Raymond Boutwell. Boutwell was appointed as the county's finance officer for the mediation.

24. Joint Resolution and Settlement Agreement between Wake County Commissioners and Wake County Board of Education Concerning Budget Disputes (hereinafter Settlement Agreement), Minutes of the Wake County Bd. of Comm'rs Meeting, July 28, 1997.

25. This amount was to be used for state-mandated expenses or unanticipated growth in student enrollment. Settlement Agreement.

26. The property tax rate was $.63 per $100 valuation in FY 1998. Fiscal Year 1998–99 Budget Ordinance § 17 (June 15, 1998). The agreement committed $.35 of this total to the school system's current expense fund for FY 1999 through FY 2003.

27. A disapproval by two-thirds of the board of county commissioners is not legally enforceable, however, because the agreement in which the provision appears was not ordered by the court. Telephone Interview with Michael Ferrell, Wake County Attorney (Dec. 5, 2001).

28. Settlement Agreement.

29. THE CONSENSUS BUILDING HANDBOOK (Lawrence Susskind et al. eds., London: Sage Publications, 1999).

30. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 262 (San Francisco: Jossey-Bass Publishers, 1996).

31. *Id.* at 262; DAVID R. GODSCHALK ET AL., PULLING TOGETHER 87–89 (Washington, D.C.: Urban Land Inst., 1994); Interview with John B. Stephens, Ass't Professor of Management and Gov't, Inst. of Gov't, The Univ. of N.C. at Chapel Hill, in Chapel Hill, N.C. (Nov. 16, 2001).

32. The sample was designed to include 4 school board members, 4 county board members, 4 school board working group members, and 4 county board working group members. Of the 4 members of the two boards, 2 were to be current and 2 to have served in 1997, including the person then serving as chair. Despite numerous attempts to contact a fourth school board member, an interview was never conducted. An interview with a fifth county board member was conducted instead, and data have been included in the analysis.

33. Goals were identified in two ways. First, a review of dispute resolution resources highlighted three common goals of settlement agreements: to avoid litigation, to prevent future disputes, and to improve relationships between parties to the dispute. Consequently, the interview protocol initially asked the interviewees if these were goals of the Wake County agreement. However, after four interviews, two additional goals—to align public accountability and to establish a predictable funding schedule—were consistently reported by the interviewees. They were added to the protocol. The remaining twelve interviewees were questioned about all five goals.

34. A table of the findings year by year and provision by provision is available from the author at enorflee@email.unc.edu.

35. Telephone Interviews with Leanne Winner; Rod Malone, Legal Counsel, Northampton County Bd. of Educ. (Jan. 9, 2002); Brian Shaw, Legal Counsel, Pamlico and Moore County Bds. of Educ. (Jan. 9, 2002); Jill Wilson, Legal Counsel, Guilford County Bd. of Educ. (Dec. 4, 2001). The agreements were reached in Guilford, Moore, Northampton, Pamlico, and Pitt counties.

36. Telephone Interview with David Cooke, Wake County Manager (Nov. 26, 2001); Interview with Raymond Boutwell, Wake County Budget Director, in Durham, N.C. (Nov. 28, 2001).

37. Telephone Interviews with Leanne Winner; David Cooke; Betty Lou Ward, Wake County Comm'r (Feb. 7, 2002); Roxie Cash, Past Chair, Wake County Bd. of Educ. (Mar. 3, 2002). *See also* Todd Silberman, *Spending on Schools Relatively Low in Wake*, NEWS & OBSERVER, June 14, 1997, at 1A.

38. Telephone Interviews with Roxie Cash; Tom Oxholm, Member, Wake County Bd. of Educ. (Dec. 6, 2001); Del Burns, Associate Superintendent for Admin. Servs., Wake County Pub. Sch. Sys. (Jan. 18, 2002).

39. A school-growth factor, which accounts for the expected number of enrolled students and inflation in the county for the following year, is multiplied by the current appropriation to calculate the following year's appropriation. For example, if student enrollment were expected to increase by 4 percent and inflation by 2 percent, then the current appropriation would be multiplied by 1.06 (which reflects both increases) to calculate the next year's appropriation. The use of a school-growth factor is currently being considered by the Citizen Advisory Committee for Appropriate Funding of Public Education in Wake County. Telephone Interviews with Tom Oxholm; William Fletcher, Member, Wake County Bd. of Educ. (Dec. 6, 2001).

40. Telephone Interviews with William Fletcher; James Merrill, then Associate Superintendent, Wake County Pub. Sch. Sys. (Jan. 16, 2002).

41. Interview with Raymond Boutwell; Telephone Interview with Terri Kimzey, Budget Director, Wake County Pub. Sch. Sys. (Nov. 20, 2001).

A Fond Farewell to Gladys Hall Coates

Gladys Hall Coates, who with her late husband, Albert, established and nurtured the Institute of Government, died Wednesday, September 25, 2002, at her home in Chapel Hill. She was 100. (For an obituary, see the Web supplement to this issue, available online at http://ncinfo.iog.unc.edu/pubs/electronicversions/pg/pgfal02/coates.pdf.)

Gladys Coates symbolized the graciousness and gentility and all that went with being a southern lady. She was an enormous asset to UNC.

—William C. Friday, president emeritus, UNC System

Albert and Gladys Coates were for so long the heart and soul of the Institute of Government, and their philosophy and sound original vision continue to be at the heart of what we do to this day. We owe them an enormous debt of gratitude, for without them this unique institution would never have been conceived or have contributed so much to North Carolina. Mrs. Coates had a wonderful spirit and keen intelligence that many of us were privileged to share over the years. We will all miss her presence among us.

—Michael R. Smith, dean, School of Government

Mr. Coates used to characterize their marriage by saying it was a match of Tidewater, Virginia, with Swampwater, North Carolina.

—Henry Lewis, Kenan professor emeritus, School of Government, and a former director of the Institute

Unquestionably one of the most important figures, along with her beloved husband, Albert, in Carolina's history.

—James Moeser, chancellor, UNC Chapel Hill

Gladys Coates was a wonderful woman whose life has been a symbol of love, loyalty, courage, and achievement. Everyone knew Gladys complemented Albert's ideas with her own cogent thoughts and gracious personality.

—Elmer Oettinger, professor emeritus of public law and government, UNC Chapel Hill, a former student of Albert Coates, and a former assistant director of the Institute

Above: Gladys Hall Coates. Clockwise from top right: Mrs. Coates with former UNC Chapel Hill Chancellor Paul Hardin; with Ann Sanders, wife of former Institute director John Sanders; with Mr. Coates at the time of his retirement in 1962; and with Janet Mason, Gladys Hall Coates Professor of Public Law and Government, in 2001.

Off the Press

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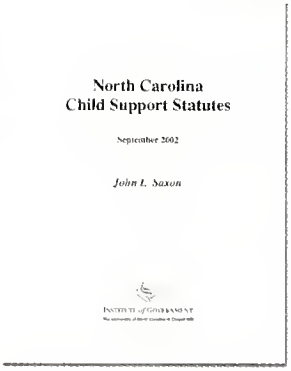

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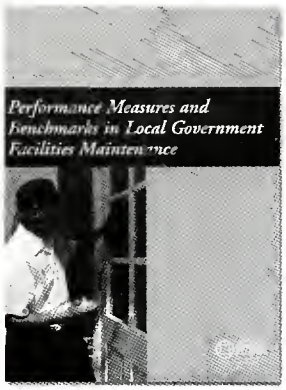

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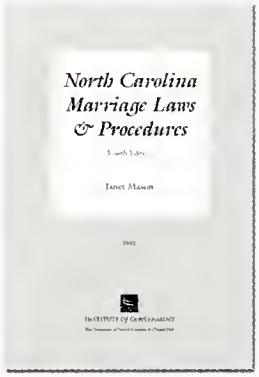

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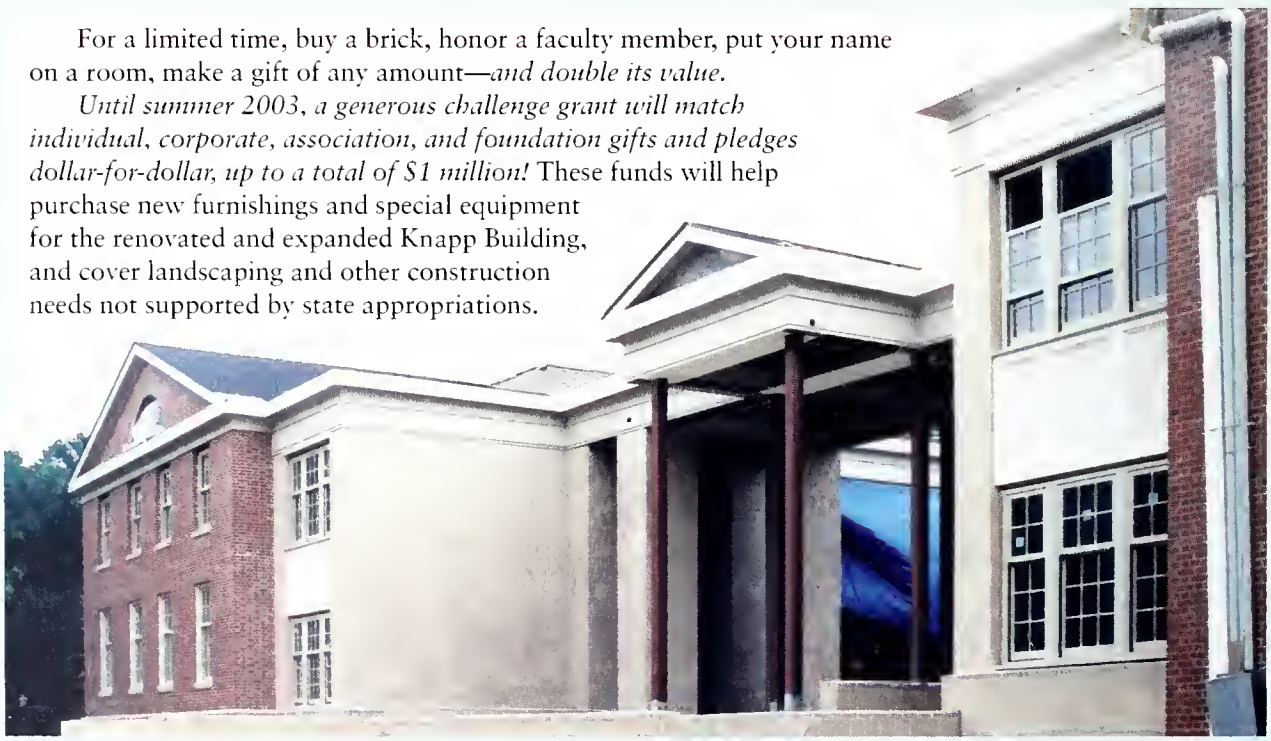

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